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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARTHUR B. MODELL,
Petitioner,

v.

GRIES SPORTS ENTERPRISES, INC.
and ROBERT D. GRIES,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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89

QUESTION PRESENTED

May an Ohio court, consistent with the Full Faith and Credit Clause, refuse to apply a Delaware statute expressly governing the validity of voting agreements entered into by shareholders of Delaware corporations when the Delaware statute is interposed as a defense in an action for specific performance of such an agreement and there is no applicable Ohio statute to the contrary?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISION AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	10
I. The Ohio Supreme Court Has Decided an Important Choice-of-Law Issue in an Aberrant Manner Which Contravenes the Full Faith and Credit Clause of the Constitution and Conflicts With Prior Decisions of This Court.	10
II. Whether the Forum State Has the Constitutional Duty To Apply the Corporation Statutes of the Incorporating State in Resolving Controversies Concerned Exclusively With the Internal Affairs of a Foreign Corporation Is a Question of Substantial Consequence Which Should Be Settled by This Court.	18
CONCLUSION	21
APPENDIX A (Opinion of the Ohio Supreme Court)	1a
APPENDIX B (Opinion of the Ohio Court of Appeals and Judgment Entry of Common Pleas Court)	9a
APPENDIX C (Judgment of the Ohio Supreme Court and Order Denying Motion for Rehearing)	37a
APPENDIX D (Statutes Involved)	39a

Page

APPENDIX E (Shareholder Voting Agreement dated December 8, 1965) 47a

APPENDIX F (Shareholder Voting Agreement dated June 15, 1971) 53a

APPENDIX G (Excerpts from Briefs of Petitioner on Rehearing before the Ohio Supreme Court) 55a

TABLE OF AUTHORITIES

Cases

	Page
Abercrombie v. Davies, 130 A.2d 338 (Del. 1957)	8
Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935)	11,16
Allstate Insurance Co. v. Hague, 449 U.S. 302 (1981) .	14,17,18
Appon v. Belle Isle Corp., 46 A.2d 749 (Del. Ch.), *aff'd sub nom. Belle Isle Corp. v. Corcoran*, 49 A.2d 1 (Del. 1946)	8
Ashtabula Gas Co. v. Public Utilities Comm'n, 102 Ohio St. 678, 133 N.E. 915 (1920)	9
Bradford Electric Light Co. v. Clapper, 286 U.S. 145 (1932)	11,17
Broderick v. Rosner, 294 U.S. 629 (1935)	*passim*
Burks v. Lasker, 441 U.S. 471 (1979)	13
Cardillo v. Liberty Mutual Co., 330 U.S. 469 (1947)	16
Carroll v. Lanza, 349 U.S. 408 (1955)	16
Cincinnati v. Cameron, 33 Ohio St. 336 (1978)	9
Clay v. Sun Insurance Office Ltd., 377 U.S. 179 (1964)	16
Converse v. Hamilton, 224 U.S. 243 (1912)	*passim*
Cort v. Ash, 422 U.S. 66 (1975)	13
Edgar v. MITE Corp., 457 U.S. 624 (1982)	14,16
Hathorn v. Lovorn, 457 U.S. 255 (1982)	9
Home Ins. Co. v. Dick, 281 U.S. 397 (1930)	17
Koval v. Peoples, 431 A.2d 1284 (Del. Super. Ct. 1981)	5

	Page
Modern Woodmen of America v. Mixer, 267 U.S. 544 (1925)	11
Nevada v. Hall, 440 U.S. 410 (1979)	16
Nicholson v. Franklin Brewing Co., 82 Ohio St. 94, 91 N.E. 991 (1910)	15
Pacific Employers Insurance Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939)	16
Paradee Oil Co. v. Phillips Petroleum Co., 320 A.2d 769 (Del. Ch. 1974), *aff'd*, 343 A.2d 610 (Del. 1975)	5
People's Railway v. Dayton Street Railway, 88 Ohio St. 529, 106 N.E. 1072 (1913, 1914)	9
R. H. Sanders Corp. v. Haves, 541 S.W.2d 262 (Tex. Civ. App. 1976)	5
Rogers v. Guaranty Trust Co., 288 U.S. 123 (1933)	12,13
Shaffer v. Heitner, 433 U.S. 186 (1977)	21
Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980)	14,16,21

United States Constitution

Article IV, section 1	*passim*

	Page
Statutes and Rules	
28 U.S.C. § 1257(3)	2,9
Delaware General Corporation Law	
Section 121(b), 8 Del. Code Ann. § 121(b)	3,15
Section 218, 8 Del. Code Ann. § 218	7,10
Section 218(a), 8 Del. Code Ann. § 218(a)	8
Section 218(b), 8 Del. Code Ann. § 218(b)	8
Section 218(c), 8 Del. Code Ann. § 218(c)	*passim*
Section 218(d), 8 Del. Code Ann. § 218(d)	*passim*
Section 228, 8 Del. Code Ann § 228	7
Ohio General Corporation Law	
Ohio Revised Code Ann. § 1701.98(A)	3,16
Ohio Revised Code Ann. § 1701.591	3,16
Ohio Rule of Civil Procedure 19	4
Ohio Rule of Practice of the Supreme Court, Rule IX, section 1	9
Other Authorities	
Folk, *The Delaware General Corporation Law* (1972)	20
Fortune, vol. 109, No. 9 (April 30, 1984)	20
Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1 (1945)	18
Kirgis, *The Role of Due Process and Full Faith and Credit in Choice of Law*, 62 Cornell L. Rev. 94 (1976)	21
Moody's Industrial Manual (1984)	20
Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 Colum. L. Rev. 1118 (1958)	12,16,19
Restatement (Second) of Conflict of Laws §§ 302-305 (1971)	13
The Wall Street Journal, May 10, 1984	20

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PETITION FOR WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

Petitioner Arthur B. Modell prays that a writ of certiorari issue to review the decision of the Ohio Supreme Court in this case.

OPINIONS BELOW

The opinion of the Ohio Supreme Court dated December 31, 1984 is reported at 15 Ohio St. 3d 284, 473 N.E.2d 807, and is set forth as Appendix A, *infra* 1a-8a. The Journal Entry and Opinion of the Court of Appeals for Cuyahoga County, Ohio dated December 1, 1983 is unreported and is set forth in Appendix B, *infra* at 9a-24a. The Judgment Entry of the Court of Common Pleas for Cuyahoga County, Ohio dated March 15, 1983 is unreported and is set forth in Appendix B, *infra* at 25a-36a.

JURISDICTION

The Ohio Supreme Court's judgment in this matter was rendered on December 31, 1984 and is set forth in Appendix C, *infra* at 37a. That court denied petitioner's motion for rehearing on February 6, 1985 by an unreported order set forth in Appendix C, *infra* at 38a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article IV, section 1 of the United States Constitution provides in pertinent part:

> Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State. . . .

Sections 218(c) and (d) of the Delaware General Corporation Law, 8 Del. Code Ann. §§ 218(c), (d), provide:

> (c) An agreement between 2 or more stockholders, if in writing and signed by the parties thereto, may provide that in exercising any voting rights, the shares held by them shall be voted as provided by the agreement, or as the parties may agree, or as deter-

mined in accordance with a procedure agreed upon by them. No such agreement shall be effective for a term of more than 10 years, but, at any time within 2 years prior to the time of the expiration of such agreement, the parties may extend its duration for as many additional periods, each not to exceed 10 years, as they may desire.

(d) The validity of any such voting trust or other voting agreement, otherwise lawful, shall not be affected during a period of 10 years from the date when it was created or last extended by the fact that under its terms it will or may last beyond the 10-year period.

Also involved are section 121(b) of the Delaware General Corporation Law, 8 Del. Code Ann. § 121(b), and sections 1701.591 and 1701.98(A) of the Ohio General Corporation Law, Ohio Rev. Code Ann. §§ 1701.591, 1701.98(A). These statutory provisions are set forth in Appendix D, *infra* 39a-46a.

STATEMENT OF THE CASE

The essential facts before the Ohio courts were stipulated and may be summarized as follows:

In 1961 petitioner Arthur B. Modell and a group of New York investors purchased majority control of Cleveland Browns, Inc., a closely-held Delaware corporation which owned the National Football League franchise for the Cleveland Browns professional football team. (O.S.C. Rec. 31-32).[1]

Mr. Modell proposed a reorganization in 1965 pursuant to Delaware law whereby a new parent corporation

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[1] Citations to the record below are to the Record and Supplemental Record before the Ohio Supreme Court, cited herein as "O.S.C. Rec." and "O.S.C. Supp. Rec."

called Cleveland Browns Football Company, Inc. ("Football Company") would be formed under the laws of Delaware. (O.S.C. Rec. 32-33, 58-75). This proposal was approved by the stockholders of Cleveland Browns, Inc., and, in connection with that approval, an agreement was signed between Mr. Modell and a group of stockholders comprised of Robert H. Gries, his son Robert D. Gries, Richard S. Cole, and Gries Sports Enterprises, Inc. ("GSE"), a Gries family holding company.[2] (O.S.C. Rec. 33, 77-84). That agreement (reprinted as Appendix E, *infra* 47a-52a) provided that the parties would vote their new Football Company stock to effectuate the election of certain officers and directors, the holding of board and committee meetings, and the repayment of certain loans from stockholders to the Football Company. (48a-51a). It specifically provided that Mr. Modell would vote his stock in favor of the election of two directors nominated by the Gries/Cole group. (48a, 51a). The 1965 agreement was to remain in effect only so long as Mr. Modell retained at least 50% of the Football Company common stock and the Gries/Cole group retained at least one-half of its 1965 stockholdings. (51a).

In 1967 Delaware added what are now sections 218(c) and (d) to its General Corporation Law, 8 Del. Code Ann. §§ 218(c), (d), App. D, *infra* at 39a. These provisions authorized the creation of shareholder voting agreements, but expressly limited their duration to a term of not more than ten years.

In 1971 Mr. Modell proposed a disproportionate stock redemption pursuant to the terms of the Delaware General

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[2] Respondents in this action are Robert D. Gries and GSE. Robert H. Gries died in 1966. Richard S. Cole, although a signatory to the agreements at issue (O.S.C. Rec. 84, 87), was not named by respondents as a party plaintiff or defendant. Petitioner contended in the Ohio courts that Mr. Cole was an indispensable party to this litigation under Ohio R. Civ. P. 19, but the Ohio courts failed to address this issue.

Corporation Law. (O.S.C. Rec. 33-34). This proposal contemplated the partial redemption of the stock of most of the Football Company stockholders, including Mr. Modell, Mr. Gries and Mr. Cole; for federal income tax reasons it was necessary that the redemption result in Mr. Modell's personal holdings dropping below 50% of the total outstanding shares. (*Id.*).

Mr. Gries, Mr. Cole and GSE consented to this redemption proposal under Delaware law, but conditioned their consent on the execution of a new shareholder voting agreement to ensure that the 1965 agreement would not automatically terminate when, because of his participation in the redemption, Mr. Modell's shareholdings fell below 50%. (O.S.C. Rec. 34; O.S.C. Supp. Rec. 20-21, 24-25). Accordingly, in June, 1971 Mr. Modell, Mr. Gries, Mr. Cole and GSE executed a new shareholder voting agreement (reprinted as Appendix F, *infra* 53a-54a), which provided for its termination when the aggregate holdings of *all* the signatories dropped below 50% of the outstanding stock. (53a). At the time of the execution of the 1971 agreement, sections 218(c) and (d) of the Delaware General Corporation Law were in effect and specifically provided a maximum term of ten years for such an agreement or an extension thereof, even if it bore no set expiration date.[3]

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[3] Agreements such as these incorporate statutory constraints by operation of law. *See, e.g., Koval v. Peoples*, 431 A.2d 1284, 1285 (Del. Super. Ct. 1981); *R. H. Sanders Corp. v. Haves*, 541 S.W.2d 262, 265 (Tex. Civ. App. 1976) (a voting agreement not expressly limited to the 10-year maximum of Texas law is deemed to incorporate the statutory period). The 1971 agreement, whether it be viewed as a modification, amendment, or an entirely new agreement, represented a new meeting of minds which thus incorporated section 218(c). *See, e.g., Paradee Oil Co. v. Phillips Petroleum Co.*, 320 A.2d 769, 774 (Del. Ch. 1974), *aff'd on this ground*, 343 A.2d 610 (Del. 1975) (renewal of agreement after statutory enactment incorporates new statute into agreement).

The instant dispute arose in March, 1982, when Mr. Gries requested that his attorney be elected to the Football Company board pursuant to the voting agreement, even though Mr. Gries and Mr. Cole, as signatories to both agreements, had been elected to the board as the group's nominees and still sat as board members pursuant to those agreements.[4] (O.S.C. Rec. 35, 96). The request was denied (O.S.C. Rec. 104), and respondents filed this action for specific performance in the Court of Common Pleas for Cuyahoga County, Ohio. The matter was submitted to the trial court on a stipulated record. The trial court, while acknowledging that the controlling issue was the enforceability of a shareholder voting agreement, nonetheless ordered the voting agreement enforced as if it were a commercial contract governed by Ohio law. (34a-36a). A unanimous panel of the Court of Appeals reversed and in a comprehensive opinion held, *inter alia*, that the shareholder voting agreement was governed by Delaware law, including section 218(c). (18a-21a). The Ohio Supreme Court, with two justices dissenting, reversed the decision of the Court of Appeals, thereby reinstating the trial court's Judgment Entry. (4a-7a). Mr. Modell filed a motion for rehearing, which was denied without opinion on February 6, 1985. (38a).

Neither the 1965 agreement nor the 1971 agreement contained an explicit "choice-of-law" provision. In 1965 and 1971 the signatories were Ohio residents and the agreements were executed in Ohio. (O.S.C. Rec. 38). The principal place of business of the Football Company was and is Cleveland, Ohio (*id.*), and it conducts its business throughout the United States and derives the bulk of its revenues from interstate activities, including nationwide television revenues and out-of-state football games. In

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[4] Mr. Gries and Mr. Cole had had a falling out, and it was Mr. Gries' position that Mr. Cole was no longer a part of the Gries/Cole group.

addition to the litigants and Mr. Cole, the Football Company had five other shareholders, four of whom resided in New York, Connecticut and Florida. (O.S.C. Rec. 37-38). All stockholder action since 1965 has been effected pursuant to section 228 of the Delaware General Corporation Law, 8 Del. Code Ann. § 228, by unanimous written consents requiring interstate mailings to and from each of them. (*Id.*). From their inception, the Football Company and Cleveland Browns, Inc. have conducted all of their corporate affairs pursuant to the authority of the Delaware General Corporation Law. (*E.g.*, O.S.C. Rec. 37, 38, 58, 62, 63, 64, 65, 68, 74; O.S.C. Supp. Rec. 30-31). In the seventeen-year history of their dealings, respondents never once raised with Mr. Modell any question of the applicability of the law of any other state.

Although petitioner contended in the trial court that the Full Faith and Credit Clause of the United States Constitution required that section 218 of the Delaware General Corporation Law be held to govern the validity of the shareholder voting agreements,[5] that court analyzed the matter as one arising under Ohio contract law, and ordered specific performance. Petitioner then presented the full faith and credit argument to the Court of Appeals as part of its contention that the trial court erred in failing to apply the law of Delaware to the dispute.[6] A unanimous panel of that court reversed the trial court, without reaching the constitutional issue, by following the generally accepted conflict-of-laws principles applicable to corporate internal affairs and applying the law of Delaware, which invalidated

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[5] Reply Brief of Defendant Arthur B. Modell in Support of Motion for Summary Judgment, p. 5; [Trial] Brief of Arthur B. Modell, p. 29; [Trial] Reply Brief of Arthur B. Modell, p. 10.

[6] Brief of Appellant Arthur B. Modell, p. 20-21.

the agreements.[7] The full faith and credit argument was raised in petitioner's briefs to the Ohio Supreme Court in support of his motion for rehearing,[8] which the Ohio Supreme Court denied on February 6, 1985, thereby rejecting *sub silentio* the full faith and credit claim.

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[7] The Ohio Supreme Court recognized that "[w]ere Delaware law to apply, the agreement between Gries and Modell would have terminated, at the latest, in 1981 . . . and cannot, therefore, be specifically performed." App. D, *infra* at 4a.

The mandatory nature of section 218(c)'s ten-year limitation is apparent not only from the language of the statute itself ("No such agreement shall be effective . . ") but also from the treatment given by the Delaware courts to sections 218(a) and (b), the closely parallel provisions imposing a time limitation "not exceeding ten years" on voting trusts. *See Abercrombie v. Davies*, 130 A.2d 338, 344 (Del. 1957) ("The statute lays down for voting trusts 'the law of their life'; compliance with its provisions is mandatory. Voting trusts not so complying are illegal."); *Appon v. Belle Isle Corp.*, 46 A.2d 749, 759 (Del. Ch.), *aff'd sub nom. Belle Isle Corp. v. Corcoran*, 49 A.2d 1 (Del. 1946).

[8] This section of the Motion of Arthur B. Modell for Rehearing, pp. 10-11, is entitled:

> The Court's Decision Unconstitutionally Deprives Delaware Corporations And Those Who Invest In And Manage Them The Full Faith And Credit Due The Laws Of The State Of Delaware.

The full text of this section of the rehearing brief is set forth in Appendix G, *infra* at 55a-57a. The corresponding section of the Reply Brief is entitled:

> Application Of Ohio Law To The Shareholders Voting Agreement Violates Article IV, § 1 Of The United States Constitution, Which Requires Ohio To Give Full Faith And Credit To The Laws Of The State Of Delaware.

The full text of this section of the reply brief on rehearing is set forth in Appendix G, *infra* at 58a-60a.

The Ohio Supreme Court has no procedural rule precluding consideration of issues raised for the first time in that court on rehearing.[9] Even if the century-old case of *Cincinnati v. Cameron*, 33 Ohio St. 336 (1878), could be read as having enunciated such a rule,[10] it has not been "strictly or regularly followed."[11] *E.g.*, *Ashtabula Gas Co. v. Public Utilities Commission*, 102 Ohio St. 678, 688, 133 N.E. 915, 917-18 (1921) (on rehearing), in which the court set aside its prior order and remanded the case based upon what "the commission now asserts" on rehearing.[12]

Given Ohio's practice in this regard, the Ohio Supreme Court's denial of the motion for rehearing in the case at bar

> must have rested either upon a substantive rejection of petitioners' federal claim or upon a procedural rule that the state court applies only irregularly. Thus, there are no independent and adequate state grounds barring our review of the federal issue.

Hathorn v. Lovorn, 457 U.S. 255, 264-65 (1982). This Court therefore has jurisdiction pursuant to 28 U.S.C. § 1257(3) to consider the petition for writ of certiorari.

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[9] The applicable Rule of Practice of the Ohio Supreme Court, Rule IX, section 1, states as follows:

> A motion for rehearing shall be filed within ten days after the announcement of the decision. Such motion must be confined strictly to the grounds urged for rehearing and must not constitute a reargument of the case. Notice of such motion shall be served on opposing counsel who shall have five days to file his memorandum contra.

[10] Paragraph 7 of the syllabus stated that "[a] rehearing will not be allowed *merely* for the purpose of assigning errors not assigned upon the original hearing." 33 Ohio St. at 337 (emphasis added).

[11] *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982).

[12] *Accord People's Ry. v. Dayton Street Ry.*, 88 Ohio St. 529, 530-32, 106 N.E. 1072, 1072 (1914) (on rehearing).

REASONS FOR GRANTING THE WRIT

I

The Ohio Supreme Court Has Decided An Important Choice-of-Law Issue in An Aberrant Manner Which Contravenes the Full Faith and Credit Clause of the Constitution and Conflicts With Prior Decisions of This Court.

In refusing to apply section 218 of the Delaware Corporation Law, the Ohio Supreme Court not only set itself apart from the overwhelming weight of authority on the issue of choice of law, it also acted contrary to prior cases of this Court holding that substantive legal questions concerning the internal affairs of a corporation are, as a federal constitutional matter, to be decided pursuant to the laws of the state of its incorporation.

This Court held in *Converse v. Hamilton*, 224 U.S. 243 (1912), and again in *Broderick v. Rosner*, 294 U.S. 629 (1935), that the Full Faith and Credit Clause requires application of the statutory law of the state of incorporation in suits brought in other states dealing with such intra-corporate matters as the extent of stockholder responsibility for corporate liabilities.

In *Converse*, an assessment suit involving Wisconsin's refusal to apply Minnesota law against Wisconsin shareholders of a Minnesota corporation, the Court stated that:

> The subject to which chapter 272 [the Minnesota law providing for assessment of shareholders of Minnesota corporations] is addressed is peculiarly within the regulatory power of the State of Minnesota; so much so that no other State properly can be said to have any public policy thereon. And what the law of Wisconsin may be respecting the relative rights and obligations of creditors and stockholders of corporations of its creation, and the mode and means of enforcing them, is apart from the question under consideration.

224 U.S. at 260-61.

Similarly, in *Broderick* the Court struck down a New Jersey statute which purported to preclude actions at law to enforce shareholder liability arising under the laws of another state; according to Justice Brandeis for the Court, full faith and credit required that New Jersey entertain an action to collect from New Jersey shareholders assessments made pursuant to the banking laws of New York, where the subject bank was incorporated. Once again the Court recognized that the "subject matter is peculiarly within the regulatory power of New York, as the State of incorporation." 294 U.S. at 643, citing and quoting the language from *Converse*, 224 U.S. at 260-61. In explaining the result in *Converse*, Justice Brandeis noted that:

> Wisconsin was required to enforce the Minnesota assessment because statutes are "public acts" within the meaning of the [full faith and credit] clause, *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145, 155; *Alaska Packers Assn. v. Industrial Accident Comm'n, ante*, p. 544; and because the residents of Wisconsin had, by becoming stockholders of a Minnesota corporation, submitted themselves to that extent, to the jurisdiction and laws of the latter State.

294 U.S. at 644-45. Quoting from *Modern Woodmen of America v. Mixer*, 267 U.S. 544, 551 (1925), the Court in *Broderick* also drew on the fraternal benefit society cases in support of its conclusion that application of the law of the state of incorporation was constitutionally compelled:

> "[T]he act of becoming a member [of a corporation] is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the State granting the incorporation."

294 U.S. at 643-44 (bracketed language in original).[13]

Petitioner recognizes that these cases are many years old and that their continued viability may well be questioned. This is all the more reason to grant the writ. Although respondents will no doubt contend that modern conflict-of-laws doctrine has passed these cases by, petitioner submits that this is not so. There are substantial reasons why, in choosing the law to be applied to internal corporate affairs, adherence to *Broderick* and *Converse* should continue to be constitutionally compelled — particularly where, as here, the forum state has no applicable substantive law or interest to advance in opposition to the law of the state of incorporation, which has specifically and comprehensively regulated the issue for its corporations. *See* Reese & Kaufman, *The Law Governing Corporate*

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[13] That shareholders are bound in their dealings concerning internal corporate matters by the law of the state of incorporation is reflected in other Supreme Court cases of the period. *See, e.g., Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 130 (1933):

> When, by acquisition of his stock, plaintiff became a member of the [New Jersey] corporation, he, like every other shareholder, impliedly agreed that in respect of its internal affairs the company was to be governed by the laws of the State in which it was organized. His rights, whatever the tribunal chosen for their vindication, are to be determined upon the ascertainment and proper application of New Jersey law.

In the case at bar, the selection of Delaware rather than Ohio as the state of incorporation is indicative of the stockholders' choice of the Delaware Corporation Law as the law which would govern the Football Company's internal affairs and the rights and duties of shareholders "as among themselves." *See* Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 Colum. L. Rev. 1118, 1127 (1958). Indeed, as part of the incorporating group, respondents had a voice in this decision at the company's inception. As the Ohio Court of Appeals noted, "a shareholder who was willing to comply with Delaware law for seventeen years . . . [should not] be permitted to repudiate that law when it no longer suits him." App. B, *infra* at 20a.

Affairs: Choice of Law and the Impact of Full Faith and Credit, 58 Colum. L. Rev. 1118, 1128, 1139 (1958).

Despite the lack of recent full faith and credit authority of this Court with respect to internal corporate matters, the rule of *Converse* and *Broderick* finds support in the fact that modern choice-of-law doctrine, even with its reliance upon "most significant contacts" analysis in many areas of the law, continues to look first and foremost to the local law of the state of incorporation in deciding issues relating to internal corporate affairs. *See*, *e.g.*, Restatement (Second) of Conflict of Laws §§ 302-305 (1971). The reasons are apparent: Such a rule provides the predictability, uniformity and certainty which are required by those making corporate and shareholder decisions.

Consistent with this approach, it is significant that this Court, in a variety of contexts, has continued to emphasize the preeminence of the law of the state of incorporation in dealing with internal corporate matters. Thus, in *Burks v. Lasker*, 441 U.S. 471, 478 (1979), the Court noted that in determining the propriety of action by a corporation's directors terminating a derivative suit, "the first place one must look to determine the powers of corporate directors is in the relevant State's corporation law." Similarly, echoing the thoughts expressed forty years before in *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1933), this Court said in *Cort v. Ash*, 422 U.S. 66, 84 (1975):

> Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.

And in invalidating on Commerce Clause grounds the Illinois tender offer statute, the Court in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982), flatly stated that "Illinois has no interest in regulating the internal affairs of foreign corporations." 457 U.S. at 645-46.

All of these factors strongly suggest that the teaching of *Converse* and *Broderick* remains valid today. Nevertheless, the issue presented in those cases — whether the Full Faith and Credit Clause requires that a state observe another state's statutes regulating the internal corporate and shareholder affairs of corporations chartered there — has not been addressed by this Court in many years. The instant case provides the Court with an ideal opportunity to do so. Given the regularity with which companies incorporate in one state and conduct their business elsewhere, resolution of this question by the Court is of profound importance, not only to America's corporate citizens large and small, but also to their numerous shareholders.[14]

Recognition of the continued validity of *Converse* and *Broderick* would be fully consistent with the most recent test of full faith and credit applicability as articulated by a plurality[15] of this Court in *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981): The forum state cannot, consistent with the Constitution, apply its own substantive law unless that state has "a significant contact or significant aggregation of contacts, *creating state interests*, such that choice

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[14] The extent to which this issue is significant to the country's corporations is intimated by the *amicus* briefs urging rehearing by the Ohio Supreme Court which were filed by out-of-state corporations with substantial or principal operations in Ohio. *See* n. 23, *infra*.

[15] Indeed, the lack of majority opinions in recent Full Faith and Credit Clause cases is another reason why the writ should be granted, in order that definitive guidance may be provided to the state and lower federal courts on this recurring constitutional issue. In addition to *Allstate*, *see Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980).

of its law is neither arbitrary nor fundamentally unfair." 449 U.S. at 312-313 (emphasis added).

Where, as in the case at bar, the forum state has no "state interests" concerning the matter at issue (the enforceability of a shareholder agreement as to the voting of shares in a Delaware corporation), the forum must apply the substantive law of the state of incorporation, insofar as it bears directly on the validity of such an agreement. The Court's analysis in *Converse* is equally applicable here — the subject matter of agreements dealing with shareholder voting in Delaware corporations is "peculiarly" within the regulatory power of Delaware, "so much so that no other State properly can be said to have any public policy thereon," and Ohio law concerning voting agreements of shareholders of Ohio corporations "is apart from the question under consideration." 224 U.S. at 260-61.

As expressed in terms of statutory law,[16] the substantial interest of Delaware and the lack of interest of Ohio are self-evident. Delaware has enacted a specific statute concerning the invalidity of voting agreements such as respondents seek to enforce, and it intended that this statute would apply to all Delaware corporations. 8 Del. Code Ann. §§ 218(c), 121(b), App. D, *infra* at 39a. In contrast, not only is the Ohio Revised Code devoid of any statute

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[16] As a matter of common law, Ohio has long recognized that internal corporate matters are to be decided by the substantive law of the state of incorporation. *See Nicholson v. Franklin Brewing Co.*, 82 Ohio St. 94, 109, 91 N.E. 991, 994 (1910) (In applying Delaware law as a complete defense in a suit to compel a Delaware corporation to register stock in plaintiff's name, the court stated: "The corporation being organized under the laws of the state of Delaware, although its principal place of business is in Ohio where the plaintiff resides and where these transactions in stock were conducted, he had actual knowledge that he was acquiring the stock of a Delaware corporation and he is deemed to know all restrictions which the laws of that state or by-laws not inconsistent with them imposed upon its alienation.").

pertaining to agreements covering shareholder voting in foreign corporations, but the only Ohio statute even remotely on point is expressly limited in application to *domestic* corporations whose stockholders have made a formal election to qualify for special statutory treatment. Ohio Rev. Code Ann. §§ 1701.591, 1701.98(A), App. D, *infra* at 39a-46a.[17]

In the face of this dearth of statutory law evidencing any interest of the state of Ohio in the matter, the forum state could legitimately refuse to apply the directly applicable Delaware statutory provision only if the Ohio contacts themselves created a state interest in so acting. The *MITE* case is again instructive — even with an Illinois contact consisting of resident ownership of a material percentage of target company shares, Illinois still could not apply its takeover law because "Illinois has no interest in regulating the internal affairs of foreign corporations." 457 U.S. at 645-46. Similarly here, even with the Ohio contacts of shareholder residence and principal place of business, Ohio cannot refuse to apply Delaware law invoked as a defense, because

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[17] Unlike the present case, in each of this Court's leading full faith and credit decisions in which a forum state was permitted to apply its own law in preference to that of a substantive statute of a sister state, the interest of the forum which was given effect had been expressed in one or more applicable forum statutes. *See, e.g., Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980); *Nevada v. Hall*, 440 U.S. 410 (1979); *Clay v. Sun Ins. Office Ltd.*, 377 U.S. 179 (1964); *Carroll v. Lanza*, 349 U.S. 408 (1955); *Cardillo v. Liberty Mut. Co.*, 330 U.S. 469 (1947); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935).

These cases are consistent with Professor Reese's full faith and credit analysis, in which the existence of "an express statute to the contrary" in the forum state is a predicate to his discussion of whether that state may constitutionally reject the otherwise applicable statutory law of the state of incorporation. Reese & Kaufman, *supra*, 58 Colum. L. Rev. at 1128.

Ohio likewise "has no interest in regulating the internal affairs of foreign corporations."[18]

This is so in the case at bar because the Ohio contacts bear no relevance to the question posed by this lawsuit, which is whether an agreement relating solely to the conduct of the internal affairs of a Delaware corporation is valid or invalid. Does it make any difference, in terms of the interests of the state of Ohio, which way this question is answered? Petitioner submits that it does not; either way, one of Ohio's citizens will win and one will lose, all with respect to the issue of how the shares in the Delaware corporation shall be voted. Ohio simply has no stake in this issue, and the Full Faith and Credit Clause exists to ensure that Ohio cannot, without such stake or interest, override Delaware's legislative judgment.[19]

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[18] The fact that petitioner asserted the applicability of section 218(c) of the Delaware General Corporation Law as a defense is also of constitutional import. Like the defendant-petitioner in *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932) (invoking the Full Faith and Credit Clause to compel a New Hampshire federal court sitting in diversity to recognize a defense afforded by Vermont statutory laws), Mr. Modell

> is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another State. The right which [he] claims should be given effect is set up by way of defense to an asserted liability; and to a defense different considerations apply. Compare *Home Ins. Co. v. Dick*, 281 U.S. 397, 407, 408. A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. But *to refuse to give effect to a substantive defense under the applicable law of another State*, as under the circumstances here presented, *subjects the defendant to irremediable liability. This may not be done*.

286 U.S. at 160 (emphasis added).

[19] That Ohio did so in the decision below "unjustifiably infring[es] upon the legitimate interests of another State" and thereby "threatens the federal interest in national unity" protected by the Full Faith and Credit Clause. *See Allstate*, 449 U.S. at 323 (Stevens, J., concurring).

The Ohio Supreme Court's unprincipled rejection of the Delaware statutory provision governing voting agreements among shareholders of Delaware corporations smacks of the arbitrariness condemned in *Allstate*. One searches in vain for any state interest articulated legislatively or judicially by the state of Ohio which could justify its refusal to apply the on-point Delaware statute in the case at bar. Petitioner submits that such disregard for the statute of a sister state implicates precisely those concerns with which the Full Faith and Credit Clause was and is designed to deal; granting the writ will enable the Court to address this important issue of federalism from today's perspective.

II

Whether the Forum State Has the Constitutional Duty To Apply the Corporation Statutes of the Incorporating State in Resolving Controversies Concerned Exclusively With the Internal Affairs of a Foreign Corporation Is a Question of Substantial Consequence Which Should Be Settled by This Court.

As Justice Jackson has noted, the Full Faith and Credit Clause "was placed foremost among those measures which would guard the new political and economic union against the disintegrating influence of provincialism in jurisprudence . . . ." Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 17 (1945). Even apart from its failure to follow this Court's decisions, the decision below must be reviewed because it carries the seeds of just such an unconstitutional "disintegrating influence."

The law of the state of incorporation has traditionally defined the rights and liabilities of shareholders among themselves with respect to corporate affairs. Such a rule promotes cooperative federalism and facilitates the efficient functioning of the national economy by affording a measure of predictability and certainty to the legal backdrop against

which corporate affairs are conducted nationwide. As Professor Reese, Reporter for the Restatement (Second) of Conflict of Laws, has explained:

> Matters that are peculiar to corporations . . . have consistently been held to be governed by the law of the state of incorporation in the absence of a local statute to the contrary. And this has generally been true even in the case of a so-called "tramp" or "pseudo-foreign" corporation which is incorporated in one state but conducts all, or nearly all, of its activities in another. . . .
>
> Justification for the rule . . . [includes] the demands of convenience, certainty, and ease of application. It is always desirable, and sometimes essential, that matters bearing on the relationships *inter sese* of the corporation and its directors, officers and stockholders be governed by a single law. This law should also be easily ascertainable, since otherwise it would be difficult, if not impossible, to foresee the legal consequences of a given course of conduct. Both of these requirements are satisfied by the application of the law of the state of incorporation.

Reese & Kaufman, *supra*, 58 Colum. L. Rev. at 1125-27.[20]

The decision below threatens this system. Under the Ohio Supreme Court's new rule, the considerations of convenience, certainty, and ease of application are replaced by disorder, uncertainty and confusion for the multitude of corporations which have located their principal places of

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[20] Professor Reese did not opine on the desirability of this rule with respect to so-called "pseudo-foreign" corporations, although he recognized that it applied to them. *Id.* at 1126. While petitioner submits that the same justifications for the rule apply equally to a "pseudo-foreign" corporation, the Football Company clearly does not fall within the "pseudo-foreign" category; it conducts business nationwide and, with its four out-of-state stockholders, every shareholder action involves multi-state contacts.

business outside of their respective states of incorporation.[21] The doubt and confusion is especially acute for those out-of-state corporations whose principal place of business is Ohio.[22] Their concerns are typified by the six corporations, both publicly-traded and closely-held, which appeared before the Ohio Supreme Court as *amici curiae* supporting petitioner's motion for rehearing, all of which maintain their principal place of business in Ohio but are incorporated elsewhere.[23] These *amici* urged that the failure to apply the law of the state of incorporation might well disrupt corporate affairs for public and private corporations, and create great uncertainty for enterprises with a multi-state presence and for their shareholders as well. In so urging, the *amici* reflected the business world's perception of the accuracy of this Court's

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[21] Of the 500 largest industrial corporations listed by *Fortune* magazine in 1984, 317 were incorporated in states other than the state of their principal place of business; 241 of these were incorporated in Delaware. *Fortune*, vol. 109, No. 9 (April 30, 1984); *Moody's Industrial Manual* (1984). Similarly, fully one-third of the companies whose stock is traded on the New York Stock Exchange are incorporated in Delaware but maintain their primary place of business elsewhere. *The Wall Street Journal*, May 10, 1984 at 31; Folk, *The Delaware General Corporation Law*, xii (1972).

[22] According to SEC filings, there are at least 126 such corporations, even limiting the search to publicly-traded companies with at least $1 million in assets and 500 stockholders. (Appendix A to Motion of Arthur B. Modell for Rehearing). A great many smaller corporations are similarly situated.

[23] The *amici* who supported the request for reconsideration were Borden, Inc. (incorporated in New Jersey); Centran Corporation (incorporated in Delaware); Champion Spark Plug Co. (incorporated in Delaware); The Hanna Mining Company (incorporated in Delaware); Owens-Corning Fiberglas Corporation (incorporated in Delaware); and SDS Biotech Corporation (incorporated in Delaware).

analysis in *Shaffer v. Heitner*, 433 U.S. 186, 215 n.44 (1977), where the Court noted that the rationale for the application of the law of the state of incorporation to internal corporate affairs is based on the need for uniformity and certainty.

Indeed, the potential for uncertainty and confusion is graphically illustrated by the case at bar. While the Ohio Supreme Court may have found the agreement enforceable under Ohio law as petitioner's personal contractual obligation, Delaware courts in subsequent proceedings may conclude that the corporation itself or other board members or shareholders, none of whom were parties to this action, cannot be bound as a matter of Delaware law by corporate elections conducted in a manner contrary to Delaware law. *Cf. Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 282-84 (1980); *see also id.* at 286-89 (White, J., concurring).

The rule adopted by the Ohio Supreme Court is an open invitation to courts desiring to give their local interests precedence over the fabric of federalism. Unless this Court grants certiorari, the decision of the court below will inevitably lead to unseemly conflicts of jurisdiction, forum shopping, races to judgment and the very type of "parochial entrenchment on the interests of other States" which the Full Faith and Credit Clause was intended to prevent. *Thomas v. Washington Gas Light Co.*, 448 U.S. at 272.

CONCLUSION

"[S]erious distortions of the choice-of-law process are rare, but when they do occur they involve such an unprincipled departure from normalcy in interstate choice of law that full faith and credit must step in to restore order . . . ." Kirgis, *The Role of Due Process and Full Faith and Credit in Choice of Law*, 62 Cornell L. Rev. 94, 122 (1976). This is such a case.

For all of the reasons set forth above, petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the Ohio Supreme Court.

Respectfully submitted,

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May 7, 1985

Appendix A

GRIES SPORTS ENTERPRISES, INC. ET AL., APPELLANTS, *v.* MODELL, APPELLEE.

[Cite as Gries Sports Enterprises, Inc. *v.* Modell (1984), 15 Ohio St. 3d 284.]

In the absence of an effective choice of law by the parties, the contacts to be taken into account to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

(Section 188 of 1 Restatement of the Law 2d, Conflict of Laws, adopted and applied.)

(No. 84-130—Decided December 31, 1984.)

APPEAL from the Court of Appeals for Cuyahoga County.

Plaintiffs-appellants, Gries Sports Enterprises, Inc. and Robert Gries ("Gries"), brought the instant action against defendant-appellee, Arthur B. Modell ("Modell"), in the Court of Common Pleas of Cuyahoga County seeking specific performance of an agreement between Gries and Modell. The trial court granted the requested relief.

Prior to 1965, Gries were minority shareholders and Modell was the majority shareholder in Cleveland Browns, Inc. ("C.B.I."), a Delaware corporation. In 1965, Modell proposed a corporate reorganization plan that would create a new Delaware corporation named Cleveland Browns Football Company, Inc. ("the Browns"). As proposed,

Modell and Gries would exchange their C.B.I. stock for a proportional amount of the Browns stock, and upon completion of such exchange, C.B.I. would be a wholly-owned subsidiary of the Browns.

Gries agreed to the implementation of Modell's proposed corporate organization only upon condition that Modell agreed to certain conditions demanded by Gries. Modell agreed to the conditions and the agreements dated December 8, 1965 (the 1965 agreement), which is the subject of this action, was executed.

The 1965 agreement provided *inter alia* for:

(1) The holding of regular directors' meetings of both the Browns and C.B.I.;

(2) the election of two directors nominated by Gries;

(3) the establishment, composition, and functioning of an investment committee;

(4) the disclosure of Modell to Gries of the commencement of any negotiation to sell any of his shares;

(5) Gries' right to obtain copies of the corporations' financial statements and reasonable access to the books and records of the Browns and C.B.I.;

(6) the prepayment, when possible, by C.B.I. of its outstanding notes; and

(7) the election of Gries designates as vice-president of both the Browns and C.B.I.

The 1965 agreement also provided that the agreement would remain in effect as long as Modell owned at least fifty percent of the common stock of the Browns or C.B.I.

In 1967, Delaware enacted a statute that limited the duration of a voting agreement among stockholders to ten years.

In 1971, Modell proposed a redemption plan whereby a certain portion of the Browns stock would be redeemed in exchange for cash. In order to obtain a federal tax advantage, Modell's holdings after the redemption would fall below fifty percent of the outstanding shares. Gries and Modell executed a document dated June 15, 1971, that reaffirmed the 1965 agreement but altered the duration of the agreement. The 1971 accord provided that the terms of the 1965 agreement would remain in effect as long as Gries and Modell owned, in the aggregate, at least fifty percent of the stock in the Browns or C.B.I. The actual redemption took place shortly after the 1971 document was executed.

On March 16, 1982, Gries demanded that pursuant to the terms of the 1965 agreement as amended, Modell exercise his voting rights to elect two directors nominated by Gries to serve on the board of directors of the Browns and C.B.I. Modell, in refusing to vote his stock to elect the two directors demanded by Gries, stated that he considered the 1965 agreement "as modified by letter agreement dated June 16, 1971, * * * [to be] invalid under Delaware corporation law." Gries thereafter commenced the instant action seeking specific performance of the 1965 agreement.

The cause was submitted to the trial court upon stipulated facts, judgment was entered for Gries, and specific performance was ordered. The trial court ruled that Ohio law, as opposed to Delaware law, controls and that the 1971 agreement was simply an amendment to the 1965 agreement and did not constitute a completely new contract. The court of appeals reversed and remanded, holding that Delaware law applies and that the 1971 agreement constituted an entirely new agreement as of 1971. The cause is now before this court pursuant to the allowance of a motion to certify the record.

Messrs. Ulmer, Berne, Laronge, Glickman & Curtis and *Mr. Marvin I. Karp*, for appellants.

Messrs. Jones, Day, Reavis & Pogue, Mr. Patrick F. McCartan, Mr. Robert C. Weber and *Mr. Matthew T. Fitzsimmons,* for appellee.

WISE, J. Gries argue that Ohio law should apply since the 1965 agreement and 1971 amendment were negotiated in Ohio, executed in Ohio, between Ohio parties, to be performed in Ohio, and an Ohio court is being requested to enforce the agreement. Gries maintain that the general rule is that the law of the place of performance controls the agreement and that Ohio, not Delaware, bears the most significant relationship to this agreement.

Modell argues that Delaware law applies. Were Delaware law to apply the agreement between Gries and Modell would have terminated, at the latest, in 1981 (ten years from the execution of the 1971 amendment), and cannot, therefore, be specifically performed. Modell's position is that matters affecting the internal affairs of the corporation should be controlled by the law of the state of incorporation. Modell also maintains that application of the law of the incorporating state promotes uniformity and predictability in corporate affairs, particularly in agreements among shareholders.

The issue before this court is whether or not the court of appeals was correct in applying Delaware law, rather than Ohio law, to the instant agreement between Gries and Modell.

The court of appeals stated that "[a]pplying the law of the state of incorporation results in uniform treatment of these directors, officers and shareholders when the corporation becomes involved in business in more than one state. See *Reese & Kaufman, The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit,* 58 Colum. L. Rev. 1118 (1958), 1124-1126."

The court of appeals further stated that even in cases where the only contact with the incorporating state is the "naked fact of incorporation" (Reese & Kaufman, *supra*, refer to such a corporation as "tramp" or "pseudo-foreign" corporations), "the law of the incorporating state has been followed in the absence of an explicitly applicable local statute." In discussing this rule Reese & Kaufman state at 1126:

"This being the rule, what of its desirability? As has already been indicated, we do not here deal with 'tramp' or 'pseudo-foreign' corporations, and therefore no opinion is expressed as to whether the rule should be applied to them."

In *Schulke Radio Productions, Ltd.* v. *Midwestern Broadcasting Co.* (1983), 6 Ohio St. 3d 436, 438, this court stated:

"Generally, Ohio follows the rule that where a conflict of law issue arises in a case involving a contract, the law of the state where the contract is to be performed governs. * * * [Citation omitted.] Some courts have noted that the rationale for this rule is that the place of performance bears the most significant relationship to the contract."

In *Schulke*, *supra*, the court confronted the situation where the parties to a contract specifically designated that the law of a forum, other than the place of performance, would apply. The court looked to 1 Restatement of the Law 2d, Conflict of Laws (1971) 561, Section 187, to resolve the question.

The court of appeals in holding that Delaware law applied stated that other states uniformly have ruled that the law of the state of incorporation governs the validity of voting agreements and cited 2 Restatement of the Law 2d, Conflict of Laws (1971) 306, Section 302.

Even though the instant agreement is not a voting trust, it is analogous to Section 305 of 2 Restatement of the Law 2d, Conflict of Laws, at 234, which provides:

"The local law of the state incorporation will be applied to determine whether shares in voting trust may be voted by the trustees, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship under the principles stated in Section 6 to the shareholders and the corporation, in which event the local law of the other state will be applied."

While Section 305 seems to favor applying the law of the state of incorporation, the principles stated in Comment *b* thereto at 325 refer back to Sections 187 and 188 of 1 Restatement of the Law 2d, Conflict of Laws, to determine the validity of the type of agreement in the case at bar. In *Schulke, supra,* this court adopted Section 187 to control the situation where the parties have chosen the law to apply to their contract.

Section 188 deals with the situation which is presented herein where the parties have not designated a choice of applicable law. That section states in part at 575:

"(2) In the absence of an effective choice of law by the parties (see Section 187), the contacts to be taken into account in applying the principles of Section 6 to determine the law applicable to an issue include:

"(a) the place of contracting,

"(b) the place of negotiations of the contract,

"(c) the place of performance,

"(d) the location of the subject matter of the contract, and

"(e) the domicile, residence, nationality, place of incorporation and place of business of the parties. * * *"

In the case at bar, the place of contracting was Ohio, the place of negotiation was Ohio, the place of performance was Ohio, the location of subject matter of contract was Ohio, the place of incorporation was Delaware, and the place of business of the parties was Ohio. The conclusion is inescapable that Ohio "bears the most significant relationship to the contract." *Schulke, supra,* at 438.

Accordingly, the judgment of the court of appeals is reversed.

Judgment reversed.

CELEBREZZE, C.J., SWEENEY, C. BROWN and J. P. CELEBREZZE, JJ., concur.

W. BROWN and HOLMES, JJ., dissent.

WISE, J., of the Fifth Appellate District, sitting for LOCHER, J.

HOLMES, J., dissenting. The majority herein incorrectly perceives this matter as one in contract and, therefore, its reliance on our prior pronouncement in *Schulke Radio Productions, Ltd.* v. *Midwestern Broadcasting Co.* (1983), 6 Ohio St. 3d 436, is misplaced. Accordingly, I must dissent.

In *Schulke, supra,* this court was confronted with a purchasing agreement executed by two foreign corporations. The entities specifically designated in the contract that all matters between the parties were to be settled in accordance with New York law. We upheld their designation pursuant to the standard concerning contractual agreements set forth in Section 187 of 1 Restatement of the Law 2d, Conflict of Laws (1971) 561.

In the present case, however, the appellate court correctly determined that this issue is one of corporate law, not contract law. It then proceeded to analyze the case according to Section 302(2) of 2 Restatement of the Law 2d, Conflict of Laws (1971) 306, which deals with the rights and liabilities of a corporation. This section provides:

"The local law of the state of incorporation will be applied to determine such issues, except in the unusual case where, with respect to the particular issue, some other state has a more significant relationship to the occurrence and the parties, in which event the local law of the other state will be applied."

In my view, with respect to the issues presented herein, Ohio does not have a more significant relationship than Delaware to the occurrence and the parties. The application of the law of the state of incorporation is clearly supported by the need of certainty, predictability and uniformity of result, as well as the protection of the justified expectations of the parties involved. A business incorporated under Delaware law should be able to expect Delaware statutory provisions to control entirely intercorporate matters. However, with the precedent set by the majority today, this expectation seemingly would no longer pertain.

Therefore, I would affirm the judgment of the appellate court which applied Delaware law to the facts presented.

W. BROWN, J., concurs in the foregoing dissenting opinion.

Appendix B

COURT OF APPEALS OF OHIO

EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 46635

GRIES SPORTS ENTERPRISES, INC., ET AL.
Plaintiff-Appellees

v.

ARTHUR B. MODELL
Defendant-Appellant

Journal Entry and Opinion

DATE OF ANNOUNCEMENT OF DECISION: _____

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court Case No. 82-44290

JUDGMENT: Reversed

DATE OF JOURNALIZATION: _____

APPEARANCES:

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SYLLABI

1. Where the incorporators of a company choose to incorporate in Delaware, and shareholders enter into an agreement concerning internal affairs of the company, in respect to this agreement its shareholders impliedly agree to be governed by the laws of the State of Delaware, notwithstanding that the shareholders entered into such an agreement in Ohio where they reside.

2. Where a shareholder agreement is "in force and effect as long as its principal shareholder owns at least 50% of the common stock" of a Delaware corporation, and it develops that the principal holder's ownership falls below 50% of the common stock of the corporation, the shareholder agreement expires by its own terms.

3. Where a 1965 shareholder agreement expires by its own terms and a new 1971 shareholder's agreement is entered into "as long as the principal stockholder and any one (of the other signatories) *together* owned at least 50% of the stock" of the Delaware corporation, the 1971 shareholder agreement must also comply by operation of law with a 1967 Delaware statute which limits the term of existence of shareholder agreements to ten years.

PRYATEL, J.

Plaintiff-appellees, Gries Sports Enterprises, Inc. (hereinafter "GSE") and Robert D. Gries, (hereinafter "Gries") on June 11, 1982 filed an action for specific performance against defendant-appellant Arthur B. Modell (hereinafter "Modell"). The parties submitted the case to the trial court for decision on a stipulated record. On March 15, 1983 the trial court granted a Decree of Specific Performance.

Defendant Modell timely appealed contending that the trial court erred as a matter of law in ruling that the validity of a shareholder voting agreement, dealing with a

Delaware corporation's management and internal affairs, is governed by law other than that of the State of Delaware, where the corporation was incorporated.

GSE, Gries and Modell are stockholders of Cleveland Browns Football Company, Inc. ("the Browns"), a holding company incorporated in 1965 under the laws of the State of Delaware. Through a wholly-owned subsidiary called Cleveland Browns, Inc. ("CBI"), also a Delaware corporation, incorporated in 1961, the Browns own and operate the Cleveland Browns franchise in the National Football League.

GSE is an Ohio corporation, and, since its creation in 1965, has been a stockholder in CBI or the Browns. At the time this action was filed, the stockholders of GSE were Gries, his sister Ellen Gries Cole, and two trusts for the benefit of Gries' brother and another sister. Gries is currently President and a director of GSE.

As of December 8, 1965, GSE owned 191.5 shares of CBI, or 18.9% of CBI's total then outstanding stock.

Gries has been a stockholder of CBI since 1961 and of the Browns since 1965. As of December 8, 1965, Gries and his then brother-in-law, Richard S. Cole ("Cole"), each owned 56 shares of CBI, or 5.5% of CBI's total outstanding stock.

Modell has been a stockholder of CBI since 1961 and of the Browns since 1965, and has been President of both entities. As of December 8, 1965, Modell held 532 shares of CBI, or 52.6% of CBI's total outstanding stock.

Prior to December 8, 1965, CBI's tax counsel suggested to Modell, as chief executive officer of CBI, a proposed plan of corporate reorganization, which proposed plan Modell communicated to other CBI shareholders, including plaintiffs. Pursuant to this proposed plan, CBI, the corporate entity controlling the National Football League

franchise, would be converted into a subsidiary of a newly-created holding company, which holding company could distribute a portion of its capital to its shareholders in a transaction with favorable tax consequences. This plan contemplated that a new corporation would be created (the Browns), with the holding company relationship being established by a transaction in which each shareholder of CBI would exchange each of his CBI shares for an equivalent share in the Browns. As part of this plan, the Browns[1] were incorporated on November 30, 1965 as a Delaware corporation.

Four of the minority shareholders (Gries, Cole, GSE and Robert Hayes Gries[2]) agreed to the redemption plan only after Modell, as consideration, consented to the following: (1) the holding of regular directors meetings of both CBI and the Browns, (2) the number of directors that said minority shareholders would be entitled to have nominated and elected, (3) the establishment, composition and functioning of an investment committee, (4) the disclosure by Modell to plaintiffs of the commencement of any negotiations to sell any substantial part of his stock or the assets of the corporation, (5) the rights of plaintiffs to copies of both corporations' financial statements and to reasonable access to the books and records of both corporations, (6) the repayment by CBI of certain outstanding notes and (7) the election of Gries and Gries' then brother-in-law, Richard Cole, as Vice Presidents of both corporations in the event that Robert Hayes Gries, by resignation or otherwise, terminated his activities with CBI and the Browns.

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[1] The Browns' original corporate name was "Cleveland Browns Sports Enterprises, Inc." which name was later changed to "Cleveland Browns Football Company, Inc."

[2] Robert Hayes Gries passed away in 1966 and was the father of plaintiff Gries.

Modell, Gries, Cole, GSE and Robert Hayes Gries executed a document including those terms and bearing the date of December 8, 1965, (see Exhibit A) which document provided, *inter alia*, that it would remain in force and effect: (Para. 9).

> so long as [Modell] owns, directly or indirectly, or [has] effective control of the voting of, at least 50% of the common stock of [the Browns or CBI], and [Gries, Cole, GSE and Robert Hayes Gries], as a group, own, directly or indirectly, or have effective control of the voting of, at least one-half of the aggregate percentage of the [CBI] common stock presently owned by [them].

This plan was placed into effect and, on December 22, 1965, the Board of Directors of the Browns met and authorized the payment of a dividend to all Browns shareholders, which dividend was paid, in large part, out of funds borrowed from a Cleveland bank. Of this dividend based on their holdings, Modell received $1,905,000 and GSE, Gries and Cole received a total of $910,000.

Prior to June 15, 1971, again as a result of tax advice Modell discussed with Robert D. Gries another plan that again would produce favorable tax results, whereby certain stockholders of the Browns would receive cash for the redemption of a portion of their shares in the Browns. In order for the redeeming shareholders to obtain capital gains treatment on the proceeds of that redemption under the Internal Revenue Code, it was necessary for (1) GSE to forego participating in the redemption to the same extent as the other participating stockholders, and for (2) Modell to reduce his shareholdings to less than fifty percent of the total outstanding shares. In order for all the shareholders participating in this redemption to receive capital gains treatment for the proceeds received from the Browns, it was necessary for each of them to reduce their percentage holdings in the Browns by at least twenty percent.

The plan involved the redemption of a substantially similar percentage of the shares of Modell, Gries, Cole, John Wells, Charles Kilroy, James Berick, Joseph Thomas, Frederick Uhlman and Edmund Johnstone, and the redemption of a significantly smaller percentage of the shares of GSE. The end result of the transaction was that the holdings of Modell, Gries, Cole and the other individual shareholders named immediately above did not significantly change in proportion to each other, the percentage holdings of GSE were significantly increased[3] in relation to those of all other shareholders, and the percentage holdings of Modell dropped below fifty percent of the total outstanding shares.

At the request of Gries, Cole and GSE (which request was acceded to by Modell) Gries, Cole, GSE and Modell executed a document bearing the date of June 15, 1971 (see Exhibit B). The agreement reaffirmed most of the obligations of the 1965 agreement except that it created a new term of life for the agreement to the effect that it would last so long as Modell and at least one of the group (Gries, Cole, or GSE) *together* owned at least 50% of the stock of the Browns. (Para. 9).

The plan of disproportionate redemption of Browns stock was approved by the Board of Directors of GSE in a document bearing the date of June 17, 1971. Pursuant to the plan, Modell tendered 411 shares of his Browns stock for a total of $4,110,000, and through such redemption had his ownership position in the Browns reduced from 59.9% to 47.2%. Gries and Cole each tendered 36 of their 56 shares of Browns stock, and each received a total of $360,000 in such redemption. GSE tendered 20 of its 191.5 shares in the Browns for $200,000, and as a result of the redemption had its ownership position in the Browns increased from 17.7% to 34.3%.

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[3] As were indirectly the holdings of its shareholders, proportionate to their ownership in GSE.

From June 15, 1971 to the present, Gries and Cole have served as members of the Boards of Directors of CBI and the Browns.

On November 11, 1981 Cole and Ellen Gries Cole executed a separation agreement wherein Cole agreed to "forthwith tender his resignation (as trustee, advisor, officer, director or otherwise) from all trusts, foundations and other entities controlled by or involving the affairs of the Gries family." On November 30, 1981, Cole resigned as an officer and director of GSE and Gries Management Company. On January 14, 1982, Cole and Ellen Gries Cole were divorced. On March 16, 1982, the Browns redeemed all of Cole's 20 shares of the Browns, which redemption was effected pursuant to a request made by Cole. An offer was made by the Browns to redeem the shares held individually by Gries on the same terms agreed to by Cole, which offer was not accepted by Gries. On February 16, 1982, Cole became a vice president of Village Square Travel, Inc., a corporation 50% of which is owned by the Browns. On October 28, 1982, Mr. Cole resigned his position with Village Square.

On March 16, 1982, the Browns' Board of Directors convened in a special meeting for the purpose of considering, among other things, the acquisition by the Browns of Cleveland Stadium Corp. On March 16, 1982, the Browns' Board of Directors was composed of Modell, Gries, Cole, Nate Wallack, James H. Berick, Patricia B. Modell and James N. Bailey, who was elected a director at the beginning of the meeting.

Gries was opposed to the proposed Cleveland Stadium Corp. acquisition. At the outset of the March 16, 1982 special meeting, Gries presented the Browns' Board of Directors with a letter nominating and designating and respectfully demanding that Robert D. Gries and Jordan C.

Bond[4] serve as Directors of "CBI" and the "Browns." Gries' letter was not acted upon by the Board at that meeting.

Following discussion at the March 16, 1982 special Board meeting, the Browns' Board of Directors approved the acquisition of Stadium Corporation, with Gries casting the only opposing vote.

On March 17, 1982, Gries and GSE filed suit against the Browns and each of the six other Board members in the Cuyahoga County Court of Common Pleas (Case No. 82-40598), seeking to rescind the Browns' acquisition of Stadium Corporation.

On April 2, 1982, Gries and GSE wrote Modell demanding that Modell comply with the letter of December 8, 1965 by commencing the holding of regular meetings of the Boards in April and December, by creating an Investment Committee, and by providing full information on proposed investments.

On April 13, 1982, Modell answered Gries and GSE, informing them that their (Browns') attorneys advised them that the December 8, 1965 letter agreement as modified by the letter agreement of June 15, 1971 was no longer valid under Delaware corporate law and that their demands which were predicated on those agreements were rejected. Nevertheless, Modell indicated that the Board intended to hold meetings regularly, that pertinent financial data was and had been available to GSE together with an opportunity to be heard, and since GSE for 17 years never sought to establish an investment committee, he believed that the Board was competent to serve in that role.

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[4] There is no evidence in the record nor in the stipulation that Gries or GSE ever withdrew or revoked Cole as their initial designated member of the Boards (of CBI and the "Browns") upon which he still serves.

From the date of execution of the June 15, 1971 letter to the present, the Boards of Directors of the Browns and CBI have never held regular meetings. Instead, the business of the respective Boards of Directors has been conducted exclusively in special meetings or by the unanimous written consent of the respective Boards. Prior to the letter of April 2, 1982, Gries, GSE and Cole at no time requested, demanded or called for any regular or special meeting of the Board of Directors of the Browns or CBI, nor objected to the method adopted by the respective Boards for the transaction of their business.

From the date of execution of the June 15, 1971 letter to the present, there have been no meetings of "investment committees" of either the Browns or CBI. Prior to the letter of April 2, 1982, Gries, GSE and Cole at no time requested or demanded such investment committee meetings.

At the time this action was filed (June 11, 1982), Modell owned 236 shares of Browns stock. Gries owned 20 shares of Browns stock. GSE owned 171.5 shares of Browns stock. Cole owned no shares of Browns stock. Broschaw & Co., a New York corporation, owned 2 shares of Browns stock. Robert E. Frisch (as custodian for G. J. Wells), a resident of New York, owned 1 share of Browns stock. Edmund F. Johnstone, a resident of Connecticut and Florida, owned 5 shares of Browns stock. The Estate of John A. Wells, which is situated in New York, owned 2 shares of Browns stock. (John A. Wells, a resident of New York during his lifetime, was a member of the Browns' Board of Directors from 1965 until his death in 1980.) James H. Berick owned 6.5 shares of Browns stock.

Since December, 1965, the principal place of business of the Browns and of CBI has been situated in Ohio.

The letter agreements of December 8, 1965 and of June 15, 1971 were executed in the State of Ohio. Discussions and negotiations respecting their terms were conducted by

telephone and with face-to-face meetings which took place in Ohio. The individual signatories to both letter agreements resided in Ohio at the time they were executed and have continued to reside in Ohio since that time.

All face-to-face formal Board meetings of the Browns and CBI since 1965 have been held in Ohio. During 1982, two such meetings were held in Cleveland, one on March 16 and one on December 22. All of the actions taken by the shareholders of the Browns and CBI since 1965, and most of the actions taken by the Board of Directors of the Browns and CBI since that time, have been effected by means of unanimous written consents or actions, with separate counterparts of the written consents usually being mailed to each shareholder or director at his residence or principal place of business, and returned to the Browns after execution by mail.

Based on these facts, appellant Modell assigns as error the following:

A. THE COURT BELOW ERRED IN FAILING TO APPLY DELAWARE LAW TO THE QUESTION OF THE VALIDITY OF SHAREHOLDER VOTING AGREEMENTS CONCERNING INTERNAL AFFAIRS OF A DELAWARE CORPORATION.

The situation faced here is not an uncommon one in this nation of fifty states. The incorporators voluntarily chose to incorporate in the state (Delaware) that allows favorable legal consequences, while maintaining their headquarters in Ohio where their primary operations take place, although the corporation does business in several states. While shareholders in this case reside in different states, most of them reside in Ohio. The case at bar presents the question of which state law, Delaware or Ohio, is applicable in determining the validity of a shareholder voting agreement, which concerns the internal affairs of a Delaware corporation.

There is a dearth of Ohio law on this question, although appellant argues that we addressed this issue in *State, ex rel. Corrigan v. Great Northern Chan Rest., Inc.* (1982), 3 Ohio App. 3d 355. In our review of that case, we find that the question there was whether a quo warranto proceeding to oust an officer of a Delaware corporation can be brought in Ohio. We held that such an action could not be maintained here since an explicitly applicable Ohio statute confined such relief to actions against principals of domestic (Ohio) corporations only. While our opinion did state that Ohio courts traditionally refuse to interfere with the internal affairs of a foreign corporation, this court was not called upon to decide, nor did we expressly rule upon the "choice of law" issue, since Ohio law preempted any choice.

However, other states uniformly have ruled that the law of the state of incorporation governs the validity of voting agreements. *Ringling v. Ringling Bros. — Barnum & Bailey Combined Shows* (1946), 49 A. 2d 603; *Diebler v. Chas. H. Elliot* (1951), 81 A. 2d 557; *Signal Oil and Gas Co. v. Ashland Oil & Refining Co.* (1958), 314 P. 2d 62, *aff'd. in part and rev'd. in part,* (1958), 322 P. 2d 1. Matters that are peculiar to corporations affect primarily the internal affairs of the corporation and thus involve the relationships within the corporation itself, such as those among its directors, officers and shareholders. Applying the law of the state of incorporation results in uniform treatment of these directors, officers and shareholders when the corporation becomes involved in business in more than one state. *See, Reese & Kaufman, The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit,* 58 Colum. L. Rev. 1118 (1958), 1124-1126. Such persons would expect that their rights and duties would be determined by the laws of the state of incorporation. *See, Restatement, Conflict of Laws,* Section 302.

As the United States Supreme Court has stated:

> When, by acquisition of his stock, plaintiff became a member of the corporation he, like every other shareholder, impliedly agreed that in respect of its internal affairs the company was to be governed by the laws of the State in which it was organized. His rights, whatever the tribunal chosen for their vindication, are to be determined upon the ascertainment and proper application of [the law of the state of incorporation]. *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 130 (1933).

Nor should a shareholder who was willing to comply with Delaware law for seventeen years when admittedly the stock was a good investment (Depo. p. 46-47) be permitted to repudiate that law when it no longer suits him.

However, there are situations to which the law of a state other than the incorporating state is applied. Actions taken by corporations that are of the nature that can also be performed by individuals (such as committing a tort, entering into a contract with persons *outside* the corporation, or entering into ordinary commercial contracts, or otherwise involving a corporation's relations with third persons) are acts that may be governed by the laws of the state in which the corporation came into contact with such third parties. *See, Reese & Kaufman, supra.* In those situations, courts apply the same choice of law principles that are applicable to noncorporate parties. *See, Restatement, Conflict of Laws,* Section 301. We find that most of the cases upon which appellees rely fall in this category, and do not deal with shareholder agreements.

Appellees argue that the law of the incorporating state on shareholder voting agreements (entered into in Ohio) should not be applied when the only contact with that state is the "naked fact of incorporation." Nevertheless, even in those cases, the law of the incorporating state has been followed in the absence of an explicitly applicable local stat-

ute. *See, Restatement, Conflict of Laws*, Section 302. This rule results in predictability and uniformity of result, ease in application of the law to be applied and protection of the parties' expectations. Thus, a state which is not the state of incorporation should not apply its laws except in the rare situation where a contrary result is required by the overriding interest of that state in having its local rules applied. *See, Restatement, supra*. We find no such overriding interest, nor an explicitly applicable local statute, in the case at bar. We therefore hold that Delaware law applies here in determining the validity of a shareholder voting agreement concerning the internal affairs of a Delaware corporation. Part A of appellant's assignment of error is well taken.

We now turn to appellant's contention that the voting agreement in question is invalid under the laws of Delaware.

B. BECAUSE THE PARTIES AGREED IN 1971 ON NEW TERMS FOR THE CONTINUATION OF THEIR SHAREHOLDER VOTING ARRANGEMENT, THE TEN-YEAR LIMIT SET BY GOVERNING LAW WAS INCORPORATED INTO THEIR AGREEMENT BY OPERATION OF LAW.

In 1967, Delaware enacted a statute that limits the life of a voting agreement to a term of ten years.[5] Delaware Code Ann., title 8, section 218(c). In pertinent part it reads as follows:

> (c) An agreement between 2 or more stockholders, if in writing and signed by the parties thereto, may provide that in exercising any voting rights, the shares held by them shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with a procedure agreed upon by them. *No such agreement shall be effective for a term*

5. Ohio does not have such a statute, nor does it have a statute authorizing such voting agreements.

> *of more than ten years,* but, at any time within 2 years prior to the time of the expiration of such agreement, the parties may extend its duration for as many additional periods, each not to exceed 10 years, as they may desire. (emphasis added)

Authorities have urged the adoption of such laws because they:

> "prevent the concomitant long term freezing of corporate incentive and management, perhaps accented by unduly conservative shareholders who refuse to allow this enterprise to embark on new adventures and seize new business opportunities."

Folk, *The Model Act and the South Carolina Corporation Law Revision,* 18 Bus. Law 351 at 382 (1963).

The voting agreement was originally signed in 1965, two years prior to the enactment of this Delaware statute. Thus, appellees argue that the Delaware law has no retroactive application. Problems of retroactivity arise when application of a statutory enactment strips persons of rights which were pre-existing or which already vested prior to the statute's effective date. *See, e.g., In re State Employee's Pension Plan* (Del. 1976), 364 A. 2d 1228.

Our situation is analogous to one involving the renewal of an insurance contract. Since the provisions of the 1971 letter agreement, except for two conditions, are identical to those of the 1965 letter agreement, the 1971 agreement can be construed as one of renewal. Although parties may renew that contract prior to its actual expiration date, the contract has a definite term of life that will end according to the provisions of that agreement. Courts have consistently held that such renewed contracts are controlled by any new laws enacted before the renewal date, even though those laws may not have existed at the time the original agreement was entered into. *See, e.g., Courville v. State*

Farm Mutual Insurance Co. (La. 1981), 393 So. 2d 703, at 705.

However, since the 1971 letter agreement changes the basic understanding of term of existence, we are persuaded that this new arrangement can more accurately be described as a new contract.

Upon the 1971 redemption, Modell's stock holding fell *below* 50% of the total, thus triggering the expiration of the 1965 agreement which could only "remain in force as long as Modell controlled *50%* of the common stock of the Browns."

On June 15, 1971, at appellee's Gries insistence, the parties reached a new meeting of the minds by agreeing to a new term of existence of the agreement, to wit, "so long as [one of the persons in the Gries group] and [Modell] own in the *aggregate* . . . at least 50 percent, of the common stock of [CBI or the Browns]."

So vital was this new understanding, that without it, "we would have refused to participate in the proportionate redemption." Gries depo., pg. 189.

The new term provided that the mutual obligation would continue as long as Modell and at least one of the persons in the Gries group *together* owned a total of 50% of the shares rather than depending on *Modell alone* owning 50% as the expired 1965 letter agreement had provided. There is no question that a major change had taken place as the 1965 contract expired. One can not modify or amend an agreement that no longer exists. Nor should a basic change in the 1965 agreement that amounts to a new agreement in 1971, although styled as a modification or amendment, allow the shareholder to escape the provisions of a 1967 enactment claiming retroactive exemption.

Thus, we hold that the Delaware statute effective in 1967 which is central to the 1971 agreement — dealing with the term of existence of the shareholder agreement — is binding upon the letter agreement of 1971.

The Delaware statute prohibited the life of a shareholders' agreement to exceed ten years unless renewed within two years prior to its expiration. No contract to renew was made within the two year renewal period.

Therefore it is our judgment that the letter agreement of 1971 contained not only the new term of existence agreed to among the parties, but also by operation of law the terms of existence imposed by the state of Delaware in 1967. Accordingly, we sustain appellant's assignment of error Part B.

The judgment of the trial court is reversed and remanded with instructions that Delaware law be applied to the shareholders 1971 voting agreement concerning internal affairs of the Delaware corporation and that the 1967 Delaware statute limiting the terms of existence of shareholders agreement to ten years be incorporated in the 1971 agreement by operation of law.

This cause is reversed and remanded to the Common Pleas Court for further proceedings consisted with this opinion.

It is, therefore, considered that said appellant recover of said appellees his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

CORRIGAN, P.J.

MARKUS, J. CONCUR

/s/ AUGUST PRYATEL
AUGUST PRYATEL, Judge

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

THE STATE OF OHIO
COUNTY OF CUYAHOGA } SS:

In The Court
of Common Pleas
Case No. 82-44290

JUDGE
RICHARD J. MCMONAGLE

GRIES SPORTS ENTERPRISES, INC., *et al.*,
Plaintiffs,

vs.

ARTHUR B. MODELL,
Defendant.

Judgment Entry

This is an action for specific performance of the contractual obligations undertaken by Arthur B. Modell and Gries Sports Enterprises, Inc., and Robert D. Gries.

This action was commenced on June 11, 1982, by plaintiffs Gries Sports Enterprises, Inc., and Robert D. Gries against defendant Arthur B. Modell.

Gries Sports Enterprises, Robert D. Gries and Arthur B. Modell are stockholders of Cleveland Browns Football Company, Inc., a holding company incorporated in 1965 under the laws of the State of Delaware. Through a wholly-owned subsidiary called Cleveland Browns, Inc., also a Delaware corporation incorporated in 1961, Cleveland Browns Football Company, Inc., own and operate the Cleveland Browns franchise in the National Football League.

Gries Sports Enterprises, Inc., is an Ohio corporation, and, since its creation in 1965, has been a stockholder in Cleveland Browns, Inc., or Cleveland Browns Football Company, Inc. At the time this action was filed, the stock-

holders of Gries Sports Enterprises, Inc., were Gries, his sister, Ellen Gries Cole, and two trusts for the benefit of Gries' brother and another sister. Gries is currently president and a director of Gries Sports Enterprises, Inc.

As of December 8, 1965, Gries Sports Enterprises, Inc., owned 191.5 shares of Cleveland Browns, Inc., or 18.9% of Cleveland Browns, Inc.'s total then outstanding stock.

Robert D. Gries had been a stockholder of Cleveland Browns, Inc., or Cleveland Browns Football Company, Inc., since 1961. As of December 8, 1965, Robert D. Gries and his then brother-in-law, Richard S. Cole, each owned 56 shares of Cleveland Browns, Inc., or 5.5% of Cleveland Browns, Inc.'s total outstanding stock.

At the time of the 1965 Agreement, plaintiffs Gries Sports Enterprises, Inc., and Robert D. Gries were minority shareholders in Cleveland Browns, Inc., and defendant Arthur B. Modell was the majority shareholder. Prior to the execution of such Agreement, defendant Modell informed plaintiffs

> "of a plan under which it is proposed that all of the holders of outstanding Common Stock of [CBI] will exchange all their [CBI] Common Stock on a share-for-share basis for common stock to be issued by a new Delaware corporation named Cleveland Browns Football Company, Inc. [the Browns]. Upon completion of such exchange, [CBI] will be a wholly-owned subsidiary of [the Browns]. It is proposed that [the Browns] will borrow as much as $3,000,000 from several lending institutions and will pledge as security for such loans all the shares of Common Stock of [CBI] owned by [the Browns]. Thereafter, it is proposed that [the Browns] distribute a substantial part of those funds to its shareholders. It is important that this plan be implemented, if it is to be implemented, prior to December 31, 1965."

As is specifically recited in the December 8, 1965 Agreement, plaintiffs agreed to the "full implementation" of the afore-described plan only after Modell agreed — and in consideration of Modell agreeing — to enter into the December 8, 1965 Agreement. In that Agreement, defendant Modell agreed to (1) the holding of regular directors meetings of both the Cleveland Browns Football Company, Inc., and Cleveland Browns, Inc.; (2) the number of directors that plaintiffs would be entitled to nominate and have elected; (3) the establishment, composition and functioning of an Investment Committee; (4) the disclosure by defendant Modell to plaintiffs of the commencement of any negotiations to sell any substantial part of his stock or the assets of the corporation; (5) the rights of plaintiffs to copies of the corporation's financial statements and to "reasonable access to the books and records" of Cleveland Browns Football Company, Inc., and Cleveland Browns, Inc.; (6) the repayment by Cleveland Browns, Inc., of certain outstanding notes; and (7) the election of Gries and Gries's then brother-in-law, Richard S. Cole, as Vice Presidents of both corporations, etc. The Agreement further provided that it would remain in full force and effect

> "so long as [Modell] owns, directly or indirectly, or [has] effective control of the voting of, at least 50% of the common stock of [the Browns or CBI], and [Gries, Cole, Gries Sports Enterprises, Inc. and Robert Hayes Gries], as a group, own, directly or indirectly, or have effective control of the voting of, at least one-half of the aggregate percentage of the [CBI] common stock presently owned by [them]."

In reliance upon the promises made by defendant in the 1965 Agreement, plaintiffs approved and participated in the implementation of the reorganization proposal. As a consequence, the reorganization, the borrowing of $3,000,000 and the cash distribution to shareholders were all effectuated in December, 1965, with defendant Modell

receiving a cash dividend of $1,905,000 and Gries Sports Enterprises, Inc., Robert D. Gries and Richard S. Cole receiving a total of $910,000.

Modell has been a stockholder of Cleveland Browns, Inc., or the Cleveland Browns Football Company, Inc., and President of both entities, since 1961. As of December 8, 1965, Modell held 532 shares of Cleveland Browns, Inc., or 52.6% of Cleveland Browns, Inc.'s total outstanding stock.

Prior to December 8, 1965, Cleveland Browns, Inc.'s tax counsel suggested to Modell, as chief executive officer of Cleveland Browns, Inc., a proposed plan of corporate reorganization, which proposed plan Modell communicated to other Cleveland Browns, Inc., shareholders, including plaintiffs. Pursuant to this proposed plan, Cleveland Browns, Inc., the corporate entity controlling the National Football League franchise, would be converted into a subsidiary of a newly-created holding company, which holding company could distribute a portion of its capital to its shareholders in a transaction with favorable tax consequences. This plan, as communicated to plaintiffs by Modell, contemplated that a new corporation would be created (Cleveland Browns Football Company, Inc.), with the holding company relationship being established by a transaction in which each shareholder of Cleveland Browns, Inc., would exchange each of his Cleveland Browns, Inc.'s shares for an equivalent share in Cleveland Browns Football Company, Inc. As part of this plan, the Browns were incorporated on November 30, 1965, as a *Delaware* Corporation.

As stated before, Modell, Robert D. Gries, Richard S. Cole, Gries Sports Enterprises, Inc., and Robert Hayes Gries executed a document bearing the date of December 8, 1965, which document provided, *inter alia*, that it would remain in force and effect:

"so long as [Modell] owns, directly or indirectly, or [has] effective control of the voting of, at least 50% of the common stock of [the Browns or CBI], and [Gries, Cole, GSE and Robert Hays Gries], as a group, own, directly or indirectly, or have effective control of the voting of, at least one-half of the aggregate percentage of the [CBI] common stock presently owned by [them]."

Some five-and-a-half years later, in the spring of 1971, defendant Modell approached plaintiffs with respect to another cash distribution proposal. Under this proposal, the Cleveland Browns Football Company, Inc., would redeem portions of the shares held by various shareholders. However, in order for the redeeming shareholders to obtain capital gains treatment (under the Internal Revenue Code) on the proceeds of that redemption, it was necessary (a) for Gries Sports Enterprises, Inc., to forego participating in the redemption to the same extent as other shareholders of the Cleveland Browns Football Company, Inc.; and (b) for defendant Modell to end up, after the redemption, owning less than fifty percent of the outstanding stock.

If, however, Modell reduced his shareholdings in the Cleveland Browns Football Company, Inc., to less than fifty percent, the 1965 Agreement would be jeopardized since, as noted above, paragraph 9 of that Agreement specifically provided that it would remain in effect only "so long as [Modell] owns, directly or indirectly, ... at least 50% of the common stock." Accordingly, before agreeing to the proposed "disproportionate redemption," plaintiffs insisted that defendant Modell agree to amending paragraph 9.

That amendment was accomplished by a letter dated June 15, 1971, wherein the parties agreed that

"Paragraph 9 of the Letter Agreement shall be amended to read as follows:

> 'This agreement shall remain in force and effect so long as any of the three of you and I, and any of our respective permitted transferees under the provisions of Paragraph 2 of the Right of First Refusal agreements of even date herewith between [the Browns] and each of us, own, in the aggregate, directly or indirectly, or have effective control of the voting of, at least 50 percent, of the common stock of [the Browns or CBI].' "

The plan which was developed involved the redemption of a substantially similar percentage of the shares of Modell, Gries, Cole, John Wells, Charles Kilroy, James Berick, Joseph Thomas, Frederick Uhlman and Edmund Johnstone, and the redemption of a significantly smaller percentage of the shares of Gries Sports Enterprises, Inc., were significantly increased in relation to those of all other shareholders, and the percentage holdings of Modell dropped below fifty percent of the total outstanding shares.

At the request of Gries, Cole and Gries Sports Enterprises, Inc., which request was acceded to by Modell, Gries, Cole, Gries Sports Enterprises, Inc, and Modell executed a document bearing the date of June 15, 1971.

The plan of disproportionate redemption of Browns' stock was approved by the Board of Directors of Gries Sports Enterprises, Inc., in a document bearing the date of June 17, 1971. Pursuant to the plan, which was effected in June of 1971, Modell tendered 411 shares of his Browns' stock for a total of $4,110,000, and through such redemption had his ownership position in the Browns reduced from 59.9% to 47.2%. Gries and Cole each tendered 36 of their 56 shares of Browns stock, and each received a total of $360,000 in such redemption. Gries Sports Enterprises, Inc., tendered 20 of its 191.5 shares in the Browns for $200,000, and as a result of the redemption had its ownership position in the Browns increased from 17.7% to 34.3%.

From June 15, 1971, to the present, Gries and Cole have served as members of the Boards of Directors of Cleveland Browns, Inc., and Cleveland Browns Football Company, Inc.

On November 11, 1981, Richard S. Cole and Ellen Gries Cole executed a separation agreement wherein Richard S. Cole agreed to "forthwith tender his resignation (as trustee, advisor, officer, director and otherwise) from all trusts foundations and other entities controlled by or involving the affairs of the Gries family." On November 30, 1981, Richard S. Cole resigned as an officer and director of Gries Sports Enterprises, Inc., and Gries Management Company. On January 14, 1982, Richard S. Cole and Ellen Gries Cole were divorced. On March 16, 1982, Cleveland Browns Football Company, Inc., redeemed all of Cole's 20 shares of Cleveland Browns Football Company, Inc., which redemption was effected pursuant to a request made by Richard S. Cole. An offer was made by Cleveland Browns Football Company, Inc., to redeem the shares held individually by Robert D. Gries on the same terms agreed to by Richard S. Cole, which offer was not accepted by Robert D. Gries. On February 16, 1982, Richard S. Cole became a vice president of Village Square Travel, Inc., a corporation, 50% of which is owned by the Cleveland Browns Football Company, Inc. On October 28, 1982, Mr. Cole resigned his position with Village Square.

On March 16, 1982, the Cleveland Browns Football Company, Inc.'s Board of Directors convened in a special meeting for the purpose of considering, among other things, the acquisition by the Cleveland Browns Football Company, Inc., of Cleveland Stadium Corporation. On March 16, 1982, the Cleveland Browns Football Company, Inc.'s Board of Directors was composed of Modell, Gries, Cole, Nate Wallack, James H. Berick, Patricia B. Modell and James N. Bailey, who was elected a director at the beginning of the meeting.

Gries was opposed to the proposed Cleveland Stadium Corporation acquisition. At the outset of the March 16, 1982, special meeting, Gries presented such notice by letter to the Browns' Board of Directors of his opposition to said acquisition. Gries' letter was not considered by the Board at that meeting.

Following discussion at the March 16, 1982, special Board meeting, the Browns' Board of Directors approved the acquisition of Cleveland Stadium Corporation, with Gries casting the only opposing vote.

On March 17, 1982, Gries and Gries Sports Enterprises, Inc., filed suit against Cleveland Browns Football Company, Inc., and each of the six other Board members in the Cuyahoga County Court of Common Pleas (Case No. 82-40598), seeking to rescind the Cleveland Browns Football Company, Inc.'s acquisition of Cleveland Stadium Corporation.

From the date of execution, June 15, 1971, to the present, the Boards of Directors of Cleveland Browns Football Company, Inc., and Cleveland Browns, Inc., have never held regular meetings. The business of the respective Boards of Directors has instead been conducted exclusively in special meetings or by the unanimous written consent of the respective Boards. Prior to the letter of April 2, 1982, Gries, Gries Sports Enterprises, Inc., and Cole at no time requested, demanded or called any regular or special meetings of the Board of Directors of Cleveland Browns Football Company, Inc., or Cleveland Browns, Inc., and never objected to the method adopted by the respective Boards for the transaction of their business.

From the date of execution, June 15, 1971, to the present, there have been no meetings of "investment committees" of either Cleveland Browns Football Company, Inc., or Cleveland Browns, Inc. Prior to the letter of April 2, 1982, Gries, Gries Sports Enterprises, Inc. and

Cole at no time requested or demanded such investment committee meetings.

At the time this action was filed, Modell owned 236 shares of Browns' stock. Gries owned 20 shares of Browns' stock. Gries Sports Enterprises, Inc., owned 171.5 shares of Browns' stock. Cole owned no shares of Browns' stock. Broschaw & Company, a New York corporation, owned 3 shares of Browns' stock. Robert E. Frisch (as custodian for G. J. Wells), a resident of New York, owned 1 share of Browns' stock. Edmund F. Johnstone, a resident of Connecticut and Florida, owned 5 shares of Browns' stock. The Estate of John A. Wells, which is situated in New York, owned 2 shares of Browns' stock. (John A. Wells, a resident of New York during his lifetime, was a member of the Browns' Board of Directors from 1965 until his death in 1980.) James H. Berick owned 6.5 shares of Browns' stock.

Since December, 1965, the principal place of business of Cleveland Browns Football Company, Inc., and of Cleveland Browns, Inc., has been situated in Ohio.

The December 8, 1965 Agreement was executed in the State of Ohio. Discussions and negotiations respecting the terms of the December 8, 1965 Agreement were conducted by telephone and face-to-face, with the face-to-face meetings occurring in Ohio. The individual signatories to said Agreement resided in Ohio at the time it was executed and have continued to reside in Ohio since that time. Robert Hays Gries died in 1966.

The June 15, 1971 Agreement was executed in the State of Ohio. Discussions and negotiations respecting that Agreement were conducted by telephone and face-to-face, with the face-to-face meetings occurring in Ohio. The individual signatories to that document resided in Ohio at the time it was executed and have continued to reside in Ohio since that time.

All face-to-face formal Board meetings of Cleveland Browns Football Company, Inc., and Cleveland Browns, Inc., since 1965 have been held in Ohio. During 1982, two such meetings were held in Cleveland, one on March 16 and one on December 22. All of the actions taken by the shareholders of Cleveland Browns Football Company, Inc., and Cleveland Browns, Inc., since 1965, and most of the actions taken by the Board of Directors of Cleveland Browns Football Company, Inc., and Cleveland Browns, Inc., since that time, have been effected by means of unanimous written consents or actions, with separate counterparts of the written consents usually being mailed to each shareholder or director at his residence or principal place of business, and returned to the Browns after execution by mail.

THE FINDINGS OF THE COURT

The defendant, Arthur B. Modell, maintains that his agreement with the plaintiffs is a "shareholder voting agreement," and inasmuch as the Cleveland Browns Football Company, Inc., is a Delaware corporation, Delaware law controls the enforceability of that agreement; that under Delaware law, a shareholder voting agreement cannot be effective for a term of more than ten years; that the "shareholder voting agreement now at issue . . . was executed in June of 1971"; and that such agreement therefore is no longer legally binding upon him. This Court cannot agree. This Court is well familiar with the "substantial contacts" rule and also the rule that states that "the parties will be presumed to have contracted with reference to the law that will make the contract valid," and as stated in *Restatement of Conflicts of Laws* (2d), § 188,

> "These contacts are to be evaluated according to their relative importance with respect to the particular issue."

Section 188 goes on to provide that if

> "the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied."

As has been stated in plaintiff's brief, such is the situation in the instant case. Both the 1965 Agreement and the 1971 amendment thereto were executed in Ohio, all of the signatories have lived in Ohio since 1965, all face-to-face negotiations with respect to both documents were conducted in Ohio, all steps relating to the performance of the 1965 Agreement have been performed in Ohio, all Board meetings have been held in Ohio, and the principal places of business of Cleveland Browns Football Company, Inc., and Cleveland Browns, Inc., have at all times been situated in the State of Ohio. Conversely, the sole contact with Delaware has been "the naked fact of incorporation." Given these circumstances, it is manifest that the validity and enforceability of the 1965 Agreement, as amended in June, 1971, must be determined under Ohio law, regardless of which conflicts-of-law rule — "substantial contacts," place-of-making or place-of-performance — is applied.

Therefore, this Court finds that the law of Ohio is binding on the parties in this matter, and the interpretation of the rights of these parties will be done so according to the laws of the State of Ohio.

The question then to be determined is whether or not the June, 1971 Agreement is an entirely new agreement between the parties, or is to be deemed an amendment to the 1965 Agreement. This Court finds that the 1971 Agreement is simply an amendment to the 1965 Agreement and, therefore, the 1965 Agreement is binding on the parties. It can be seen as such from both the form and substance of the June 15, 1971 letter that it was nothing more than an attempt to amend in two limited respects the 1965 Agreement, and that the 1965 Agreement was to remain in full force and effect. See plaintiffs' brief, page 16.

The Court orders that the Decree of Specific Performance of the plaintiffs be granted as an appropriate remedy for the defendant's breach of the Shareholders' Voting Agreement; and the defendant, Arthur B. Modell, is further ordered to comply with all the terms and provisions of the December 8, 1965 Letter Agreement, as prayed for in the Complaint.

/s/ RICHARD J. MCMONAGLE
Richard J. McMonagle, Judge

Dated: 3/15/83

Received for Filing
March 15, 1983

Gerald E. Fuerst, Clerk
By /s/ Beatty, Dep.

Appendix C

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1984 Term
To wit: December 31, 1984

GRIES SPORTS ENTERPRISES, INC., *et al.*,
Appellants,
vs.
ARTHUR B. MODELL,
Appellee

No. 84-130

Appeal From The Court of Appeals for Cuyahoga County

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is reversed for the reasons set forth in the opinion rendered herein.

It is ordered and adjudged also that _____ _____ appellant ___ recover from _____ _____ appellee its costs expended in this Court _____ ; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, JAMES WM. KELLY, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this ___ day of _____ 19___

_____ Clerk

_____ Deputy

THE SUPREME COURT OF OHIO

COLUMBUS

GRIES SPORTS ENTERPRISES, INC. *et al.*, *Appellants*, *vs.* ARTHUR B. MODELL, *Appellee*.	**1985 Term** *To Wit:* February 6, 1985 **Case No. 84-130** **Rehearing**

It is ordered by the court that rehearing in this case is denied.

I, JAMES WM. KELLY, Clerk of the Supreme Court of the State of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 6th day of February, 1985.

JAMES WM. KELLY Clerk.

By /s/ SAM F. ADKINS Deputy.

Appendix D

DELAWARE GENERAL CORPORATION LAW

§ 121. General powers.

. . .

(b) Every corporation shall be governed by the provisions and be subject to the restrictions and liabilities contained in this chapter.

DELAWARE GENERAL CORPORATION LAW

§ 218. Voting trusts and other voting agreements.

. . .

(c) An agreement between 2 or more stockholders, if in writing and signed by the parties thereto, may provide that in exercising any voting rights, the shares held by them shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with a procedure agreed upon by them. No such agreement shall be effective for a term of more than 10 years, but, at any time within 2 years prior to the time of the expiration of such agreement, the parties may extend its duration for as many additional periods, each not to exceed 10 years, as they may desire.

(d) The validity of any such voting trust or other voting agreement, otherwise lawful, shall not be affected during a period of 10 years from the date when it was created or last extended by the fact that under its terms it will or may last beyond the 10-year period.

OHIO REVISED CODE ANN.

[§ 1701.59.1] § 1701.591 [Close corporation agreement.]

(A) In order to qualify as a close corporation agreement under this section, the agreement shall meet the following requirements:

(1) Every person who is a shareholder of the corporation at the time of the agreement's adoption, whether or not entitled to vote, shall have assented to the agreement in writing;

(2) The agreement shall be set forth in the articles, the regulations, or another written instrument;

(3) The agreement shall include a statement that it is to be governed by this section.

(B) A close corporation agreement that is not set forth in the articles or the regulations shall be entered in the record of minutes of the proceedings of the shareholders of the corporation and shall be subject to the provisions of division (C) of section 1701.92 of the Revised Code.

(C) Irrespective of any other provisions of this chapter, but subject to division (D)(2) of this section, a close corporation agreement may contain provisions, which shall be binding on the corporation and all of its shareholders, regulating any aspect of the internal affairs of the corporation or the relations of the shareholders among themselves, including the following:

(1) Regulation of the management of the business and affairs of the corporation;

(2) The right of one or more shareholders to dissolve the corporation at will or on the occurrence of a specified event or contingency;

(3) The obligation to vote the shares of a person as specified, or voting requirements, including the requirement of the affirmative vote or approval of all shareholders or of all directors, which voting requirements need not appear in the articles unless the close corporation agreement is set forth in the articles;

(4) The designation of the persons who shall be the officers or directors of the corporation;

(5) The authority of any individual who holds more than one office of the corporation to execute, acknowledge, or certify in more than one capacity any instrument required to be executed, acknowledged, or certified by the holders of two or more offices;

(6) The terms and conditions of employment of an officer or employee of the corporation without regard to the period of his employment;

(7) The declaration and payment of dividends or distributions or the division of profits;

(8) Elimination of the board of directors, restrictions upon the exercise by directors of their authority, or delegation to one or more shareholders or other persons of all or part of the authority of the directors;

(9) Conferring on any shareholder or his agent the absolute right, without the necessity of stating any purpose, to examine and copy during usual business hours any of the corporation's records or documents to which reference is made in section 1701.37 of the Revised Code;

(10) Prohibition of or limitation upon the issuance or sale by the corporation of any of its shares, including treasury shares, without the affirmative vote or approval of the holders of all or a proportion of the outstanding shares or unless other specified terms and conditions are met;

(11) Arbitration of issues on which the shareholders are deadlocked in voting power or on which the directors or other parties managing the corporation are deadlocked.

(D) Except as may be necessary to give effect to divisions (C)(3), (5), (8), and (9) and division (I) of this section, any provision of a close corporation agreement that does either of the following shall be invalid:

(1) Eliminates the filing with the secretary of state of any document required under this chapter or changes the required form or content of the document;

(2) Waives or alters the effect of any of the provisions of section 1701.03, 1701.18, 1701.24, 1701.25, 1701.30, 1701.31, 1701.32, 1701.33, 1701.35, 1701.37, 1701.38, 1701.39, 1701.591 [1701.59.1], 1701.91, 1701.93, 1701.94, 1701.95, or the first sentence of section 1701.64 of the Revised Code.

Unless otherwise provided in the close corporation agreement, the invalidity of a provision pursuant to this division does not affect the validity of the remainder of the agreement.

(E) Unless a close corporation agreement requires the affirmative vote or written consent of the holders of a greater proportion of the shares of any class, it may be amended or terminated by the affirmative vote or written consent of the holders, then parties to the close corporation agreement, of four-fifths of the outstanding shares of each class. If a close corporation agreement is amended or terminated by the written consent of the holders of fewer than all shares, the secretary of the corporation shall mail a copy of the amendment or a notice of the termination to each shareholder who did not so consent. If a close corporation agreement set forth in the articles is amended, the amendment shall not be effective unless it is filed as an amendment to the articles pursuant to section 1701.73 of the Revised Code.

(F) No close corporation agreement is invalid among the parties or in respect of the corporation on any of the following grounds:

(1) The agreement is an attempt to treat the corporation as if it were a partnership or to arrange the relationship of the parties in a manner that would be appropriate only among partners;

(2) The agreement provides for the conduct of the affairs of a corporation or relations among shareholders in any manner that would be inappropriate or unlawful under provisions of this chapter other than those set set forth in division (D)(2) of this section or under other applicable law;

(3) The agreement interferes with the authority or discretion of the directors;

(4) The agreement has not been filed with the minutes as required by division (B) of this section.

(G) If a close corporation agreement provides that there shall be no board of directors, both of the following apply to the shareholders:

(1) They are, for the purposes of any statute or rule of law relating to corporations, deemed to be the directors to the extent not inconsistent with the close corporation agreement;

(2) They have all of the liabilities of directors.

(H) The existence of a close corporation agreement shall be noted conspicuously on the face or the back of every certificate for shares of the corporation and a purchaser or transferee of shares represented by a certificate on which such a notation so appears shall be conclusively considered to have taken delivery with notice of the close corporation agreement. Any transferee of shares by gift, bequest, or inheritance and any purchaser or transferee of shares with knowledge or notice of a close corporation agreement is bound by the agreement and shall be considered to be a party to the agreement.

(I) A close corporation agreement becomes invalid if shares of the corporation are listed on a national securities exchange, are regularly quoted in an over-the-counter market by one or more members of a national or affiliated securities association, or are transferred or issued to a person who takes delivery of the certificate for the shares other than by gift, bequest, or inheritance and without knowledge or notice of the close corporation agreement and that person does not consent in writing to the close corporation agreement within thirty days after the date on which a certificate for the shares has been issued in the name of that person or his nominee.

In the event of such invalidity and unless otherwise provided in the close corporation agreement, any provision contained in the agreement that would not be invalid under any other section of this chapter or under other applicable law remains valid and binding on the parties to the close corporation agreement.

Any officer of the corporation who learns of the occurrence of any event causing the invalidity of the close corporation agreement shall immediately give written notice of such invalidity to all of the shareholders.

If a close corporation agreement set forth in the articles of the corporation becomes invalid, the officers of the corporation shall promptly sign and file the certificate of amendment prescribed by section 1701.73 of the Revised Code, setting forth the reason for the invalidity and deleting the close corporation agreement from the articles. If the officers fail to execute and file the certificate within thirty days after the occurrence of the event giving rise to the invalidity, the certificate may be signed and filed by any shareholder and shall set forth a statement that the person signing the certificate is a shareholder and is filing the certificate because of the failure of the officers to do so.

(J) A close corporation agreement, in the sound discretion of a court exercising its equity powers, is enforceable by injunction, specific performance, or other relief that the court may determine to be fair and appropriate.

(K) The failure of a corporation, pursuant to a close corporation agreement, to observe corporate formalities relating to meetings of directors or shareholders in connection with the management of the corporation's affairs shall not be considered a factor tending to establish that the shareholders have personal liability for corporate obligations.

(L) This section shall not be construed as prohibiting any other lawful agreement among two or more shareholders.

(M) No corporation with respect to which a close corporation agreement is in effect, shall issue shares in uncertificated form, and any resolution of the directors of such a corporation, providing for the issuance of shares in uncertificated form, shall be ineffective during such period as a close corporation agreement is in effect. The adoption of a close corporation agreement shall act as a transfer instruction to such corporation to replace uncertificated securities with appropriate certificated securities in accordance with division (C) of section 1308.43 of the Revised Code.

(N) The amendments to this section that are effective April 1, 1985, are remedial in nature and apply to all close corporations created on or after November 17, 1981.

OHIO REVISED CODE ANN.

§ 1701.98 Applicability of chapter.

(A) Except as provided in sections 1701.01 to 1701.98, inclusive, of the Revised Code, the provisions of said sec-

tions shall apply only to domestic corporations, and except as otherwise provided in this section, the provisions of said sections shall apply to all domestic corporations, whether formed under said sections or under previous laws of this state.

Appendix E

ARTHUR B. MODELL
12520 Edgewater Drive
Lakewood, Ohio 44107

December 8, 1965

Mr. Robert Hays Gries
Mr. Robert D. Gries
Mr. Richard S. Cole
Gries Sports Enterprises, Inc.

Gentlemen:

I write this letter to confirm my understanding with each of you as a result of our recent discussions. If each of you agree that this letter correctly sets forth our understanding, please so indicate by signing an enclosed copy of this letter in the space provided at the foot thereof and return such copy to me, whereupon this agreement will be deemed to have become effective as of the date of this letter.

The ledgers of Cleveland Browns, Inc. ("Browns") indicate that, as of the date of this letter, the Browns had 1100 shares of Common Stock authorized of which 1012 shares were outstanding. Each of you owned the number of shares of Common Stock and the principal amount of 5% Subordinated Notes due 1971 of the Browns ("Notes") set forth opposite your name below:

Name	No. of Shares	Amount of Notes
Robert Hays Gries	Zero	$80,833
Robert D. Gries	56	37,000
Richard S. Cole	56	37,000
Gries Sports Enterprises, Inc.	191.5	Zero

As you know, I presently own 532 shares of the outstanding Common Stock of the Browns and hold an option to purchase an additional 48 shares. In addition, I expect to

purchase at least 87 shares of Browns' Common Stock and $213,000 principal amount of Notes presently owned by others.

I have informed you of a plan under which it is proposed that all of the holders of outstanding Common Stock of the Browns will exchange all their Browns Common Stock on a share-for-share basis for common stock to be issued by a new Delaware corporation named Cleveland Browns Football Company, Inc. ("Football"). Upon completion of such exchange, Browns will be a wholly-owned subsidiary of Football. It is proposed that Football will borrow as much as $3,000,000 from several lending institutions and will pledge as security for such loans all the shares of Common Stock of Browns owned by Football. Thereafter, it is proposed that Football distribute a substantial part of those funds to its shareholders. It is important that this plan be implemented, if it is to be implemented, prior to December 31, 1965.

Each of you agrees to the full implementation of the above-described plan and agrees to participate in that plan to the extent necessary to implement it, including, without limitation, the exchange of your stock, and in consideration thereof, I agree with each of you as follows:

1. Both Football and Browns shall hold meetings of their respective Boards of Directors on the 3rd Monday in April and September of each year and the by-laws of each shall so provide. Such Boards shall consist of no more than nine members, and you, as a group, shall be entitled to nominate and have elected two directors of each Board.

2. Both Football and Browns shall have an Investment Committee of each Board of Directors, which shall hold meetings in Cleveland during alternate months on ten day's written notice by the Chairman of the Investment Committee. Such Investment

Committees shall consist of no more than six members, and two of said six members shall be persons designated by you, as a group. Other meetings of the Investment Committee may be called from time to time by the Chairman of the Investment Committee on twenty-four hours notice. At such meetings the President of Football and Browns shall discuss and give full information concerning proposed investments by each such company, it being understood that all "investments," except those in the normal course of business and relating to the Browns football activities, require approval by the Board of Directors of such respective companies.

3. (a) In the event that I begin negotiations to sell all or a substantial part of my common stock of Football, I shall so inform you and before closing shall, if you so request, attempt to secure from any such prospective purchaser, the same terms and conditions of any such sale for all or such part of your common stock of Football as you indicate.

(b) In the event that I, in my capacity as an officer of Browns or Football, shall enter into negotiations looking toward a sale of all or substantially all of the assets of either such company, I shall keep the Investment Committee promptly and fully informed during the course of the negotiations and, at your request, I shall promptly disclose to the prospective purchaser your interest in remaining or continuing or participating, as a minority interest, in the new ownership and I shall afford the members of your group an opportunity to meet with the prospective purchaser, at an early stage of the negotiations, to discuss your possible participation in the new ownership.

4. I agree that: (a) there shall be prepared and you shall receive annually copies of the certified financial statements for Browns and Football prepared

by their independent certified public accountants, and you also shall receive copies of any interim financial statements of such corporations prepared by such accountants; and (b) you shall have reasonable access to the books and records of such corporations, including their stock books and Note register.

5. When, as, and if the Browns shall have surplus in an amount in excess of $500,000, which shall be free from any restrictions upon its use, I agree to use my best efforts to cause the Browns to prepay its then outstanding Notes, as provided in such Notes to the extent of its available funds.

6. In the event that Robert Hays Gries, by resignation or otherwise, shall terminate all his activities connected with the Browns or Football, Robert D. Gries and Richard S. Cole each promptly shall be elected a Vice President of Browns and Football, to perform such duties as the respective Boards of Directors shall designate, and each shall be paid a total salary, as a Vice President for both companies, of $5,000 per year with an expense account for activities connected with the business of Browns and Football in a sum not to exceed $1,500 per year, payable against appropriate vouchers.

In the event of the death of Robert Hays Gries, his present allotment of Browns football game tickets shall be divided equally between Robert D. Gries and Richard S. Cole.

7. In the event that Gries Sports Enterprises, Inc. in the future shall propose to engage in any additional business activities which may require approval of the National Football League or its Commissioner, I will use my best efforts to cause Browns and Football to advise said Commissioner that Browns and Football

each has no objection to any such proposal, if any such proposal is not detrimental, in my opinion, to the business of Browns or Football or in violation of the Constitution and By-Laws of the National Football League.

8. All references in this agreement to "Browns" and "Football" shall include (i) to the extent consistent with the purposes of this agreement, any wholly-owned subsidiary of either such company, if any, and (ii) any corporation resulting from any reorganization of either Browns or Football in which you and I shall hold respective stock interests within the limitation of our stock interests in Browns and Football as set forth in paragraph 9 of this agreement.

9. This agreement shall remain in force and effect so long as I own, directly or indirectly, or have effective control of the voting of, at least 50% of the common stock of Football or Browns, and you, as a group, own, directly or indirectly, or have effective control of the voting of, at least one-half of the aggregate percentage of the Browns common stock presently owned by you.

10. I and each of you will vote all of our common stock of Browns and Football, and otherwise act, so as to make effective the proposed plan and all of the terms contained in, and contemplated by, this agreement.

It is expressly understood that this agreement supersedes in all respects any previous agreements, written or oral, between any of you and me, including, without limitation, a certain letter agreement between me and Robert Hays Gries dated March 15, 1961.

You appreciate that, as Chief Executive Officer and majority shareholder of Browns, as well as possibly the

occupant of such positions with Football, my primary duty is to act in the best interests of such corporations at all times, and my understandings with you as set forth herein are, in our joint judgment, in the best interests of those corporations.

Sincerely,

/s/ ARTHUR B. MODELL
Arthur B. Modell

The foregoing agreement is hereby accepted as of the date first above written.

/s/ ROBERT HAYS GRIES
Robert Hays Gries

/s/ RICHARD S. COLE
Richard S. Cole

Gries Sports Enterprises, Inc.

/s/ ROBERT D. GRIES
Robert D. Gries

By /s/ ROBERT HAYS GRIES
President

Appendix F

MR. ARTHUR B. MODELL
18801 S. Park Boulevard
Shaker Heights, Ohio 4412

June 15, 1971

Mr. Robert D. Gries
Mr. Richard S. Cole
Gries Sports Enterprises, Inc.

Gentlemen:

Reference is made to the letter agreement, dated December 8, 1965, between the three of you and Mr. Robert Hays Gries and me (the "Letter Agreement"). Because of various changes which have taken place in connection with my personal situation and the shareholdings of Cleveland Browns Football Company, Inc., we have agreed that certain changes should be made in the Letter Agreement as follows:

1. Paragraph 9 of the Letter Agreement shall be amended to read as follows:

"This agreement shall remain in force and effect so long as any of the three of you and I, and any of our respective permitted transferees under the provisions of Paragraph 2 of the Right of First Refusal agreements of even date herewith between Football and each of us, own, in the aggregate, directly or indirectly, or have effective control of the voting of, at least 50 percent, of the common stock of Football or Browns.

2. A new Paragraph 11 shall be added to read as follows:

"This agreement shall be binding upon the parties hereto and their respective legal representatives, heirs, successors and assigns."

In all other respects, every other provision of the Letter Agreement shall remain in full force and effect, and any failure on the part of any party hereto to enforce, or previously to have enforced, any provision of the Letter Agreement shall not invalidate such provision or any other provision of the Letter Agreement.

Sincerely,

/s/ ARTHUR B. MODELL
Arthur B. Modell

The foregoing is hereby accepted as of the date first above written.

/s/ ROBERT D. GRIES
Robert D. Gries

/s/ RICHARD S. COLE
Richard S. Cole

GRIES SPORTS ENTERPRISES, INC.

By /s/ ROBERT D. GRIES Pres.
President

Appendix G

IN THE SUPREME COURT OF OHIO

Case No. 84-130

GRIES SPORTS ENTERPRISES, INC., et al.,
Plaintiffs – Appellants,

v.

ARTHUR B. MODELL,
Defendant – Appellee.

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

MOTION OF ARTHUR B. MODELL FOR REHEARING (ORAL ARGUMENT REQUESTED ON THE MOTION)

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Attorneys for Defendant – Appellee

3. The Court's Decision Unconstitutionally Deprives Delaware Corporations And Those Who Invest In And Manage Them The Full Faith And Credit Due The Laws Of The State Of Delaware.

To refuse to defer to the express provisions of the Delaware General Corporation Law in this instance violates Article IV § 1 of the United States Constitution, which requires the several states to give full faith and credit to each others' laws and decisions. It had heretofore been universally accepted that the legality of voting agreements is to be determined by reference to the law of the state of incorporation. Indeed, the question is one of constitutional dimension, for it involves the 'full faith and credit' which must be accorded to the duly created legal entities of foreign jurisdictions. As Professor Cary, one of the leading commentators on matters of corporate law, has stated:

> [F]ull faith and credit must be given to Delaware Corporation Law as to companies organized there but operating in other states. The conflicts rules . . . also compel reference back to the Delaware Code and case law. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 Yale L. J. 663, 669 (1974) (citation omitted).

The duty of a state to give full faith and credit to statutes regulating the internal affairs of foreign corporations was established conclusively over fifty years ago by the United States Supreme Court, per Justice Cardozo, in *Clark v. Willard*, 292 U.S. 112 (1934). In *Clark*, the Supreme Court held that under the statutes of Iowa, the official liquidator of an insurance company incorporated in Iowa was the successor to the corporation, and that the Supreme Court of Montana had denied full faith and credit to the statutes of a sister state by failing to accept as conclusive the Iowa statutory provision on successorship. *Id.* at 121; *see also* later opinion, *Clark v. Williard*, 294 U.S. 211,

212 (1935) (Cardozo, J.). As recognized by this Court in its December 31 decision, the Delaware General Corporation Law does in fact deal specifically with the very issue before this Court — it provides that the agreement at issue expired in 1981 at the latest. Case No. 84-130, slip. op. at 5. Thus, in refusing to give effect to the applicable Delaware law, this Court denied full faith and credit to the laws of its sister state. *Cf. Wells v. Hiskett* 288 S.W. 2d 257, 263 (Tex. Civ. App. 1956), *writ refused n.r.e.* (full faith and credit must be accorded the public acts of other states including the issuance of charters to corporations).

IN THE SUPREME COURT OF OHIO

Case No. 84-130

GRIES SPORTS ENTERPRISES, INC., et al.,
Plaintiffs – Appellants,

v.

ARTHUR B. MODELL,
Defendant – Appellee.

APPEAL FROM THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

REPLY BRIEF OF ARTHUR B. MODELL

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(216) 348-3939

Attorneys for Defendant – Appellee

D. Application Of Ohio Law To The Shareholders Voting Agreement Violates Article IV, § 1 Of The United States Constitution, Which Requires Ohio To Give Full Faith And Credit To The Laws Of The State Of Delaware.

Conspicuous by its absence from appellants' Brief in Opposition is any effective response to the full faith and credit issues that appellee has raised throughout the history of this case — that Ohio must accord full faith and credit to the laws of, and corporate charters issued by, the State of Delaware. *See, e.g., Clark v. Williard*, 292 U.S. 112 (1934); *Wells v. Hiskett*, 288 S.W. 2d 257, 263 (Tex. Civ. App. 1956), *writ refused n.r.e.* (full faith and credit must be accorded the public acts of other states including the issuance of charters to corporations).

Appellants deal with this issue by pure circumlocution. They contend that this case does not present an issue respecting Delaware law because Delaware law is inapplicable to this case. Brief in Opposition at 9-10. Based upon this type of legal casuistry, any violation of the Constitution could be excused by the simple means of declaring the Constitution inapplicable to the matter at hand.

Throughout this litigation Mr. Modell has maintained that it would violate the United States Constitution for an Ohio court to refuse to apply the express terms of a Delaware statute dealing specifically with the matter at issue when the parties and the corporation have for years conducted all of their corporate affairs pursuant to the Delaware General Corporation Law. Furthermore, such avoidance of the clear mandate of Delaware law violates fundamental fairness, as the Court of Appeals observed, because shareholders like Mr. Gries who were "willing to comply with Delaware law for seventeen years when admittedly the stock was a good investment . . . [should not] be permitted to repudiate that law when it no longer suits [them]."

(Appellants' App. at 48.) This Court's failure to accord full faith and credit to § 218(c) of the Delaware General Corporation Law, the specific Delaware statute which limited this shareholders voting agreement to a term of ten years, demonstrates yet another error in this Court's December 31, 1984 decision and yet another error which undermines the validity and enforceability of the judgment. This is also yet another issue nowhere discussed in the Court's opinion.

Office - Supreme Court, US
FILED
JUN 6 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1755

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARTHUR B. MODELL,

Petitioner,

v.

GRIES SPORTS ENTERPRISES, INC., *et al.*,

Respondents.

On Appeal from the Supreme Court of Ohio

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

A. The Issues In The Court Below 2

B. A State Court's Choice Of Its Own Law Does Not Violate The Full Faith And Credit Clause Where, As In The Instant Case, There Existed A Significant Aggregation Of Contacts With The Parties And The Subject Matter Of The Action 8

CONCLUSION 17

TABLE OF AUTHORITIES

CASES: Page

Alaska Packers Ass'n v. *Industrial Accident Comm'n*, 294 U.S. 532 (1935) 8

Allstate Insurance Co. v. *Hague*, 449 U.S. 302 (1981) *passim*

Broderick v. *Rosner*, 294 U.S. 629 (1935) 13, 14

Carroll v. *Lanza*, 349 U.S. 408 (1955) 13

Converse v. *Hamilton*, 224 U.S. 243 (1912) 13, 14

Galler v. *Galler*, 32 Ill.2d 16, 203 N.E.2d 577 (1950) ... 2-3

STATUTES:

8 Delaware Code Annotated § 218(C) 4

Ohio Revised Code Annotated § 1701.591(B) 11

Ohio Revised Code Annotated § 1701.591(H) 3, 11

OTHER AUTHORITIES:

Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1 (1945) ..8, 15

Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law*, 62 Cornell L. Rev. 94 (1976) 16

Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit*, 58 Colum. L. Rev. 1118 (1958) 16-17

Restatement (Second) of Conflict of Laws §§ 187-188 (1971) 6

Restatement (Second) of Conflict of Laws § 305 (1971) 6

United States Supreme Court Rule 17 (1980) 17

Williams, *The Impact of Allstate Insurance* v. *Hague on Constitutional Limitations on Choice of Law*, 17 U. Rich. L. Rev. 489 (1983) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1755

ARTHUR B. MODELL,

Petitioner,

v.

GRIES SPORTS ENTERPRISES, INC., *et al.*,

Respondents.

On Appeal from the Supreme Court of Ohio

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The decision of the Ohio Supreme Court is in full conformity with established choice-of-law principles enunciated in the Restatement (Second) of Conflict of Laws, and, since a significant aggregation of contacts existed between Ohio and the parties and the subject matter, that decision in no way violated the

Full Faith and Credit Clause. There is no question of law at issue that justifies the grant of a writ of certiorari here.

ARGUMENT

A. The Issues In the Court Below

Petitioner is asking this Court to review a state court decision specifically enforcing a written contract between shareholders of a closely held corporation, the object of which contract was to protect the rights and interests of the minority shareholders (who, in this instance, own *43%* of the subject corporation). Under the contract, entered into in 1965, petitioner agreed, among other things, to (a) permit the minority shareholders (respondents herein) to choose two directors, (b) hold regular directors' meetings, (c) establish an Investment Committee to review and consider potential investments, (d) disclose to the minority shareholders the commencement of any negotiations to sell assets of the corporation or any portion of the majority shareholder's stock, and (e) provide the minority shareholders with copies of the corporation's financial statements and "reasonable access to the books and records of such corporation."

The importance of such shareholder agreements, as a means of safeguarding minority shareholders against arbitrary or exclusionary conduct on the part of the majority shareholder, has long been recognized. As was pointed out by the Supreme Court of Illinois in *Galler* v. *Galler,* 32 Ill.2d 16, 203 N.E.2d 577, 583-584 (1950):

> "Without a shareholder agreement, specifically enforceable by the courts, insuring him a modicum

> of control, a large minority shareholder might find himself at the mercy of an oppressive or unknowledgeable majority. * * * For these and other reasons too voluminous to enumerate here, often the only sound basis for protection is afforded by a lengthy, detailed shareholder agreement securing the rights and obligations of all concerned."

Ohio subscribes to this same public policy, as is evidenced by Ohio Revised Code § 1701.591(H), which statute specifically encourages "agreements among two or more shareholders."

Because the 43% minority shareholders involved in this case refused to accede to a self-dealing transaction put forward in 1982 by the majority shareholder (as a result of which the majority shareholder received $4,800,000 of corporate funds), the majority shareholder (petitioner herein) *repudiated* the above-described shareholders' agreement. Respondents therefore filed an action for specific performance in the Court of Common Pleas for Cuyahoga County, Ohio.[1] Respondents prevailed in that court, and that decision was ultimately upheld by the Supreme Court of Ohio.

In a last-ditch attempt to avoid abiding by his obligations under the shareholders' agreement, petitioner is attempting to persuade this Court that this case involves a significant "constitutional issue" — even

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[1] At page 6 of his Petition for Writ, petitioner suggests that respondents filed suit because he refused respondents' request, on March 16, 1982, that their attorney be elected to the Board of Directors. In fact, the record clearly establishes that suit was not filed until after petitioner sent respondents a letter, dated April 13, 1982, stating that he was not going to comply with *any of the terms* of "the December 8, 1965 letter agreement as modified by the letter agreement dated June 15, 1971." (O.S.C. Rec. 104)

though that issue was *never mentioned* by petitioner in the Brief on the Merits that he filed in the Supreme Court of Ohio.

Thus, as briefed by the parties, the Ohio courts were presented with two principal issues:

a. Did a June 15, 1971 letter executed by petitioner —which letter simply *amended* one paragraph of the 1965 shareholders' agreement—constitute a "new agreement", so that the entire agreement would be subject to statutes (such as Section 218(C) of the Delaware Corporation Law, adopted in 1967) that were enacted *after* the 1965 shareholders' agreement went into effect?

b. If the June 15, 1971 letter did create a "new agreement," was the validity and enforceability of that agreement governed by Ohio law or by Delaware law?

Although petitioner blithely states that, in June 1971, the parties executed "a *new* shareholder voting agreement" (Petition for Writ, p. 5), the Common Pleas Court expressly held otherwise:

> "[T]he 1971 Agreement is simply an amendment to the 1965 Agreement, and, therefore, the 1965 Agreement is binding on the parties. It can be seen as such from both the form and substance of the June 15, 1971 letter that it was nothing more than an attempt to amend in two limited respects the 1965 Agreement, and that the 1965 Agreement was to remain in full force and effect." (Petitioner's App. 35a)

The intermediate Court of Appeals for Cuyahoga County, however, concluded that the 1971 letter should be deemed to be a "new contract," notwithstanding

the fact that said letter was "styled as a modification or amendment" (Petitioner's App. 23a). The Supreme Court of Ohio, on the other hand, interpreted the 1971 letter to be *an "amendment"* (Petitioner's App. 4a), pointing out that it "reaffirmed the 1965 agreement but altered the duration," in that, as a result of the amendment, the 1965 agreement was to remain in effect "so long as Gries and Modell owned, in the aggregate, at least fifty percent of the stock in the Browns or CBF." (Petitioner's App. 3a)

With respect to the second (or choice-of-law) issue, the Common Pleas Court held that, *given the particular facts of this case,* it was

> "manifest that the validity and enforceability of the 1965 Agreement, as amended in June, 1971, *must be determined under Ohio law,* regardless of which conflicts-of-law rule—'substantial contacts,' place of making or place of performance—is applied." (Petitioner's App. 35a)

In support of this conclusion, the Common Pleas Court cited the fact that

> "[b]oth the 1965 Agreement and the 1971 amendment thereto were executed in Ohio, all of the signatories have lived in Ohio since 1965, all face-to-face negotiations with respect to both documents were conducted in Ohio, all steps relating to the performance of the 1965 Agreement have been performed in Ohio, all Board meetings have been held in Ohio, and the principal places of business of Cleveland Browns Football Company, Inc., and of Cleveland Browns, Inc. have at all times been situated in the State of Ohio. Conversely, *the sole contact with Delaware has been 'the naked fact of incorporation.'* " (*Ibid.*)

Once again, the intermediate Court of Appeals disagreed, holding that *all contracts between shareholders* of a corporation should be governed by the law of the *state in which the corporation is incorporated,* even though the sole contact between that state and the parties to the contract is the "naked fact of incorporation." (Petitioner's App. 20a)

The Supreme Court of Ohio, on the other hand, agreed with the Common Pleas Court that the rights of the contracting parties should be determined under Ohio law. Applying the settled rule that, in an action involving a contract, courts should apply the law of the state that "bears the most significant relationship to the contract" (Petitioner's App. 5a; Restatement (Second) of Conflict of Laws, §§ 187 and 188), the Supreme Court concluded that, in the instant case, the

> "conclusion is inescapable that Ohio 'bears the most significant relationship to the contract.'" (Petitioner's App. 7a)

Moreover, in answer to the argument of petitioner that a different rule should apply where the contract in some way involves the affairs of a corporation, the Supreme Court pointed out that Section 305 of the Restatement—which Section deals *specifically* with *shareholder voting trusts*—expressly provides that the law of the state of incorporation will *not* be applied where "some other state has a more significant relationship." (The obvious relevance of Section 305 to the instant case is underscored by the fact that the Comments thereto use, as an example, a conflicts-of-law situation involving a statute which imposes a ten-year limitation on the duration of *shareholder voting trusts*—the same limitation that Delaware imposes on

shareholder voting agreements!) Applying the Restatement's "significant relationship" principle to the instant case, the Ohio Supreme Court held that Delaware law should not be applied to this particular shareholders' agreement because there was no question *in this case* but that Ohio "bears the most significant relationship to the contract" (Petitioner's App. 7a): "the place of contracting was Ohio, the place of negotiation was Ohio, the location of subject matter of contract was Ohio", and "the place of business of the parties was Ohio." (*Ibid.*). Conversely, the *sole contact with Delaware* was that that state happened to be "the place of incorporation."

It was only *after* the Supreme Court of Ohio issued its decision that petitioner decided to recloak his arguments in the garb of full faith and credit—a concept that petitioner did not even mention in the Brief on the Merits that he filed in that court. Thus, it was not until petitioner filed his Motion for Rehearing that he raised, for the first time in the Supreme Court, a full faith and credit argument.[2]

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[2] To support his Motion for Rehearing, petitioner also orchestrated the simultaneous filing of six *amicus curiae* briefs by corporations for whom petitioner's attorneys have performed legal services. Since those simultaneous briefs were filed several weeks before the Ohio Supreme Court's decision was officially published it was hardly surprising that *all six* briefs were (a) similarly structured and phrased and (b) submitted under the name of the particular corporation's in-house counsel. Nevertheless, those orchestrated briefs are repeatedly referred to in the Petition for Writ in an attempt to magnify the significance of petitioner's argument. The truth of the matter, of course, is that publicly-held corporations could not possibly be affected by this case, since the shareholders of a publicly-held corporation could not be expected

B. A State Court's Choice Of Its Own Law Does Not Violate The Full Faith And Credit Clause Where, As In The Instant Case, There Existed A Significant Aggregation Of Contacts With The Parties And The Subject Matter Of The Action.

The Ohio Supreme Court's reliance on the choice-of-law principles set forth in the Restatement was in no way violative of the U.S. Constitution. For, contrary to what petitioner suggests, the Full Faith and Credit Clause does *not* displace choice of laws rules adopted by individual states and require a forum state to automatically apply statutes enacted by other states.[3] Rather, a state court's choice of its own law is constitutional so long as there is a "significant aggregation of contacts" between the forum state and the parties and subject matter involved in the litigation. As was stated in the plurality opinion in *Allstate Insurance Co.* v. *Hague,* 449 U.S. 302, 308 (1981):

> "In deciding constiutional choice-of-law questions, whether under the Due Process Clause or the Full Faith and Credit Clause, this Court has traditionally examined the contacts of the State, whose law was applied, with the parties and with the occurrence or transaction giving rise to the litiga-

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to enter into a shareholders' agreement such as is involved here. Moreover, if shareholders of a closely-held corporation do not wish to be subject to the Restatement rule applied by the Ohio Supreme Court, they can easily *specify,* in the agreement itself, what law applies.

[3] As was pointed out by this Court in *Alaska Packers Ass'n* v. *Industrial Accident Commission,* 294 U.S. 532, 547 (1935), to require a forum state to always give full faith and credit to a foreign state's laws would lead to the "absurd result" that, in every conflict of law case, the forum state's laws would be applied only in the foreign state.

> tion. See Clay II, supra, at 183, 12 L Ed 2d 229, 84 S Ct 1197. In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair, see Alaska Packers Assn. v. Industrial Accident Comm'n, 294 US 532, 542, 79 L Ed 1044, 55 S Ct 518 (1935), the Court has invalidated the choice of law of a State which has had no significant contact or significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction."[4]

Accordingly, in the *Allstate* case, this Court held that the choice of Minnesota law by the Minnesota Supreme Court did *not* violate the Full Faith and Credit Clause, because Minnesota

> "had a significant aggregation of contacts with the parties and the occurrence, creating state interests, such that application of its law was neither arbitrary nor fundamentally unfair." (449 U.S. at 320)

The same conclusion follows in the instant case, where the "significant aggregation of contacts * * * creating state interests" on the part of Ohio has already been described:

> "Both the 1965 Agreement and the 1971 amendment thereto were executed in Ohio, all of the signatories have lived in Ohio since 1965, all face-to-face negotiations with respect to both documents were conducted in Ohio, all steps relating to the performance of the 1965 Agreement have

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[4] To the same effect is the dissenting opinion of Justice Powell (joined in by Justice Rehnquist and the Chief Justice), which states:

> "The Court should invalidate a forum state's decision to apply its own law *only when there are no significant contacts* between the State and the litigation." (449 U.S. at 332)

> been performed in Ohio, all Board meetings have been held in Ohio, and the principal places of business of Cleveland Browns Football Company, Inc., and Cleveland Browns, Inc., have at all times been situated in the State of Ohio. Conversely, the sole contact with Delaware has been 'the naked fact of incorporation.' " (Petitioner's App. 35a)

In the words of the Ohio Supreme Court, the "conclusion is inescapable that Ohio 'bears the most significant relationship to the contract.' " (Petitioner's App. 7a)

Petitioner attempts to avoid this "significant aggregation of contacts" by ignoring them entirely—just as petitioner scrupulously avoids mentioning the fact that *every member* of this Court *agreed,* in the *Allstate* case, that a forum state's decision to apply its own law should *not* be invalidated where (as here) "significant contacts" exist. (See p. 9 above)

Instead, petitioner attempts to argue that a forum state has no "state interests" with respect to a matter if the forum state has no *specific statute* dealing therewith. This suggested criterion, however, makes no logical sense. For it is manifest that unless a state legislature determines to *prohibit or limit* a particular activity or contract which otherwise is clearly legal, the legislature will *not enact a statute* with respect to that activity or contract. For example, in the absence of any Ohio court decision decreeing otherwise, the Ohio Legislature could hardly be expected to enact a statute saying that "shareholders of a corporation may enter into contracts among themselves and such contracts are valid regardless of whether they contain any time limitations." Yet, because Ohio has not enacted a statute saying substantially that, Ohio courts—ac-

cording to petitioner's novel theory—must impose on such a contract a ten-year limitation adopted by the Delaware Legislature, even though the contracting parties are all residents of Ohio, own in the aggregate *96 percent* of the stock of the corporation and have never set foot in the state of Delaware.[5]

The truth of the matter, of course, is that the existence of "state interests" on the part of Ohio does *not* depend on the existence of a specific Ohio statute declaring valid that which Delaware has declared to be invalid.[6] Rather, as this Court recognized in *Allstate,* "state interests" are *created,* not by the legislature's enactment of a statute, but by "a significant contact or *significant aggregation of contacts* * * * such that choice of [Ohio's] law is neither arbitrary nor fundamentally unfair." (449 U.S. at 308)

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[5] As it happens, Ohio *does* have a statute which *specifically encourages* shareholder agreements of the kind involved in the instant case. Thus, Ohio R.C. § 1701.591, enacted by the Ohio Legislature in 1981, expressly sanctions "close corporation agreements" that are executed by all the shareholders of a closely-held corporation and which contain provisions "regulating any aspect of internal affairs of the corporation or the relations of the shareholders among themselves." (§ 1701.591(B)) Moreover, the Legislature was careful to provide that this statute "shall not be construed as prohibiting any other lawful agreement among two or more shareholders." (§ 1701.591(H)) It is therefore manifest that the public policy of Ohio favors shareholder agreements of the kind that are involved in this case.

[6] Indeed, statutory "silence" on the part of one state was one of the flaws in the early "balancing of interests" approach to full faith and credit, which approach this Court ultimately abandoned. See Williams, *The Impact of Allstate Insurance* v. *Hague on Constitutional Limitations On Choice of Law,* 17 Univ. Rich. L. Rev. 489, 493-4 (1983).

A similar flaw is inherent in petitioner's argument that Ohio "has no interest in regulating the internal affairs of foreign corporations." (Petition, p. 17) As pointed out above, the constitutional validity of a state court's choice-of-law determination depends on the existence of a "significant aggregation of contacts," not on the amorphous type of "interest" that petitioner is advocating. (Indeed, as this Court specifically noted in *Allstate,* it no longer attempts to balance or "weigh" the interests of the different states in a choice-of-law matter. 449 U.S. at 308, fn. 10). Nevertheless, even if "interest" were defined in such a manner, it is manifest that Ohio has a considerable "interest" in protecting, upholding and enforcing contracts entered into by Ohio residents that are in no way violative of Ohio law.

Moreover, contrary to the theme that pervades petitioner's entire argument, the Ohio courts in the instant case were *not* attempting to regulate the "internal affairs of a foreign corporation;" they were simply enforcing a *contract* between Ohio residents who, together, own *ninety-six percent* of the stock of that "foreign corporation." In other words, the instant case does not deal with such "internal corporate" matters as the issuance or reclassification of corporate shares, the legality of corporate bonds, the declaration and payment of dividends, the redemption by a corporation of its own stock, the fiduciary duties of a director, etc. Instead, the instant case involves a contract between certain shareholders whereby a majority shareholder, in order to obtain a $1,905,000 cash distribution in 1965 (Petitioner's App. 27a-28a), agreed to (a) permit the minority shareholders to choose two directors, (b) convene regular directors' meetings, (c)

establish an Investment Committee to review and consider potential investments, (d) disclose to the minority shareholders the commencement of any negotiations to sell assets of the corporation or any portion of the majority shareholder's stock, and (e) provide the minority shareholders with copies of the corporation's financial statements and "reasonable access to the books and records of such corporation." Hence, rather than attempting to "regulate the internal affairs of a corporation," the Ohio Supreme Court simply held that, from the standpoint of conflict-of-laws, such a contract is no different than any other contract—and therefore the same choice-of-law factors are to be taken into consideration, to wit:

> "(a) the place of contracting,
>
> (b) the place of negotiation of the contract,
>
> (c) the place of performance,
>
> (d) the location of the subject matter of the contract, and
>
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." (Petitioner's App. 6a)

Petitioner misses this distinction entirely when he repeatedly argues that the early cases of *Converse* v. *Hamilton,* 224 U.S. 243 (1912) and *Broderick* v. *Rosner,* 294 U.S. 629 (1935) require that "substantial legal questions concerning the internal affairs of a corporation" be decided "pursuant to the laws of the state of its incorporation." (Petition, pp. 10-15) This distinction, however, did not escape Justice Frankfurter in *Carroll* v. *Lanza,* 349 U.S. 408 (1955). In his dissenting opinion in that case, Justice Frank-

furter pointed out that the *Converse* and *Broderick* line of cases dealt with statutory assessments imposed against out-of-state shareholders of an insolvent corporation under the laws of the state of incorporation. In holding that those statutory assessments had to be given full faith and credit by the forum,

> "[t]he Court relied on the fact that in each case a judicial proceeding in the incorporating state had previously passed upon the necessity and amount of the assessment, and that, although shareholders in the forum were not parties to such a proceeding, their interest was adequately represented by other shareholders." (349 U.S. at 417)

However, when

> "the commercial context is not that of shareholder-corporation but *simple contract,* the Court has found less need for uniformity and accordingly has given greater leeway to the forum on a showing of *substantial interest in the contract, e.g.,* that one of the parties is a *resident of the forum* or that the *contract is to be performed within its borders.* The Court has spoken of the presumed acceptance of the forum's laws by a corporation doing business in the forum." (*Ibid.*) (emphasis added)

This, of course, is precisely the situation that is involved in *the instant case:* a "simple contract," where not merely one but *all* of the parties subscribing thereto are "residents of the forum" and the contract "is to be performed within its borders."

Hence, petitioner's forebodings of "disorder, uncertainty and confusion" notwithstanding, the Ohio Supreme Court's decision will have no impact on—and, in fact, has nothing to do with—"matters bearing on the relationship *inter sese* of the corporation and its

directors, officers and shareholders." Indeed, Section 305 of the Restatement (followed by the Ohio Supreme Court in the instant case) has existed in that treatise for many years, and respondents are unaware of any "disorder, uncertainty and confusion" that has arisen as a consequence, even though Section 305 clearly stipulates that shareholder voting trusts are to be interpreted in accordance with the laws of a state other than the state of incorporation in situations where (as here) that "other state has a more significant relationship." Moreover, if the shareholders who enter into a shareholders' agreement or voting trust do not wish to follow the Restatement rule, all they need do is insert into their agreement a provision specifically designating the state whose laws are to govern. Conversely, to adopt petitioner's approach and apply the Full Faith and Credit Clause to choice-of-law disputes involving *contracts* would clearly invite "disorder, uncertainty and confusion." As is stated in one of the law review articles relied upon by petitioner:

> "If the Full Faith and Credit Clause is to be applied to choice of law in contracts, troublesome and multitudinous cases will be subject to federal review." Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution,* 45 Colum. L. Rev. 1, 14 (1945).

In this regard, it should be noted that *all* of the law review articles cited by petitioners were decided *before* this Court adopted, in *Allstate,* the "significant aggregation of contacts" test. Furthermore, all of those articles specifically recognized (contrary to petitioner's argument in this case) that nothing in the Full Faith and Credit Clause precludes a forum state from upholding stockholders' rights with respect to a foreign corporation where most of the stockholders reside, and

the principal place of business of the corporation is located, in the forum state. Thus, in Kirgis, *The Roles of Due Process and Full Faith and Credit in Choice of Law,* 62 Cornell L. Rev. 94 (1976), the author discussed a California Corporations Code provision mandating choice of California law on a variety of internal corporate matters (such as election and removal of directors, internal liability of directors, cumulative voting, etc.) relating to foreign corporations if more than half of the outstanding voting stock of the foreign corporation is held by Californians. In considering whether application of that statute to a Delaware corporation meeting the California statutory conditions would constitute a denial of full faith and credit to Delaware law (which, for example, restricts cumulative voting), the author concluded that it would not:

> "It is not clear why the state of incorporation must be the bellwether state when the business contacts and voting shareholders are centered in another state * * *. Nothing inherent in the full faith and credit policies of federalism would prevent a state clearly having the greatest interest in a corporation and in the rights of its stockholders from displacing the state where the incorporators chose to file the incorporation papers." (62 Cornell L. Rev. at 140).

To the same effect is the last of the three pre-*Allstate* articles relied upon by petitioner (Reese & Kaufman, *The Law Governing Corporate Affairs: Choice of Law and the Impact of Full Faith and Credit,* 58 Colum. L. Rev. 1118, 1133 (1958)), which states:

> "A factor of obvious importance is the nature of the corporation's connection with the state which is attempting to apply its own law. The closer this connection, the greater is the state's interest

in the case, and the lesser is the likelihood that it will be compelled to apply the law of the state of incorporation. The extent of the corporation's activity in the state is material, as is the fraction which this activity represents of the corporation's total business. * * * The number of creditors and stockholders of the corporation who are domiciliaries of the state is another factor to be considered. Also, the importance of a given contact can be expected to vary somewhat depending upon the issue involved. If, for example, the question before the court involves the rights of stockholders, the *number of stockholders domiciled in the state should assume particular significance.*" (emphasis added)

CONCLUSION

Respondents submit that petitioner has wholly failed to sustain his burden of establishing, under Rule 17, that there are special and important reasons why the writ should be granted. The decision of the Ohio Supreme Court was not only fully consistent with choice-of-law rules set forth in the Restatement (Second) of Conflict of Laws, but also clearly met the test of constitutional validity set forth (and agreed to by all members of this Court) in *Allstate Insurance Company* v. *Hague,* 449 U.S. 302 (1981).

Respectfully submitted,

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